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In the Matter of

ADJUSTMENT OF RATES FOR  
NONCOMMERCIAL EDUCATIONAL  
BROADCASTING COMPULSORY LICENSE

) Docket No. 96-6 CARP NCBRA  
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**PETITION OF BROADCAST MUSIC, INC.  
TO SET ASIDE OR, IN THE ALTERNATIVE,  
MODIFY THE PANEL REPORT DATED JULY 22, 1998**

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Dated: August 5, 1998

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**PETITION OF BROADCAST MUSIC, INC.  
TO SET ASIDE OR, IN THE ALTERNATIVE,  
MODIFY THE PANEL REPORT DATED JULY 22, 1998**

Pursuant to 37 C.F.R. § 251.55(a) (1997), Broadcast Music, Inc. ("BMI"), hereby petitions the Librarian of Congress (the "Librarian") to set aside or, in the alternative, modify the Report of the Copyright Arbitration Royalty Panel (the "CARP" or "Panel") issued July 22, 1998, in this proceeding (the "Report"). In its Report, the Panel set the statutory compulsory license fees and terms for the Public Broadcasters' use of music<sup>1</sup> in the repertoires of BMI and the American Society of Composers, Authors and Publishers ("ASCAP") for the five-year period January 1, 1998 through December 31, 2002.<sup>2</sup> The Panel's determination as to fees is arbitrary

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1. As the Report states, this is "[m]ore precisely, for the Public Broadcasters' public performance of programming containing published nondramatic musical works contained in the repertoires of ASCAP and BMI. 17 U.S.C. § 118(d). As discussed *infra*, 'Public Broadcasters' include those 'public broadcasting entities' that have not voluntarily settled with ASCAP and BMI on a schedule of license rates and terms and that are represented in this proceeding. 17 U.S.C. § 118(b)(3)." *Report 1 n.1.*
  2. Following the citation form of the Report, references to the transcript record will be cited as "*Tr.* \_\_\_\_" followed by the page number. References to written direct testimony will be cited as "*W.D. of*" followed by the last name of the witness and the page number. References to written rebuttal testimony will be cited as "*W.R. of*" followed by the last

(Footnote continued on next page)

and contrary to 17 U.S.C. § 118, contrary to precedent of prior CARPs and the Copyright Royalty Tribunal (the "CRT"), and inconsistent with the evidence adduced in this proceeding.<sup>3</sup>

The Librarian should reject and set aside the Panel's determination to utilize the 1978 Copyright Royalty Tribunal ("CRT") determination as the benchmark for setting license fees. The Librarian should instead adopt the Proposed and Reply Findings of Fact and Conclusions of Law submitted by BMI and set the following rate for noncommercial broadcasting to pay BMI under 17 U.S.C. § 118:<sup>4</sup>

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(Footnote continued from previous page)

name of the witness and the page number. References to exhibits submitted with the direct cases will be cited as "*Direct Exh.*" preceded by the party that submitted the exhibit and followed by the exhibit number. References to exhibits introduced during the hearing will be cited as "*Exh.*" preceded by the party that introduced the exhibit and followed by the exhibit number. References to proposed findings of fact and conclusions of law will be cited as "*PFFCL*" preceded by the party that submitted same and followed by the page number. In addition, references to the Report will be cited as "*Report*" followed by the page number.

3. The Panel correctly noted that "[e]xcepting the royalty *rates* prescribed under subsection (b), the parties agreed and stipulated to the language of the attached, proposed regulation, 37 CFR § 253.3." *Report* 38 n.48. As the Panel noted, "[h]owever, ASCAP advocated that the regulation be divided into two subparts with the first subpart prescribing terms applicable only to ASCAP, and the second subpart prescribing *identical* terms applicable only to BMI." *Id.* The Panel correctly opined that there is "no need for separate subparts." *Id.*
4. BMI's Proposed Findings of Fact and Conclusions of Law and BMI's Reply Proposed Findings of Fact and Conclusions of Law are, pursuant to 37 C.F.R. § 251.55(a), included herein as Appendix A and Appendix B. The Appendices contain confidential materials subject to the protective order in this proceeding and contain materials subject to the "attorneys' eyes only" confidentiality agreement entered into between BMI and ASCAP on October 21, 1997.

(a) a fee of \$5,500,000 for each year from 1998 through 2002 from the 356 public television stations represented by Public Broadcasting Service ("PBS") in this proceeding ("PBS stations"),<sup>5</sup> and

(b) a fee of \$1,395,000 for each year from 1998 through 2002 from the 691 public radio stations represented by National Public Radio ("NPR") in this proceeding ("NPR stations").<sup>6</sup>

If the Librarian decides not to reject and set aside the Panel's method, the Librarian, for the reasons set forth below, should modify that method and set a rate in the range of between \$3.128 million and \$3.87 million for BMI.

### **Summary of Argument**

This Panel had but one direction — to establish subsidy-free, fair market value rates. 17 U.S.C. § 801(b)(1) directs the Panel to "make determinations as to reasonable terms and rates of royalty payments as provided in [17 U.S.C.] Section 118." The legislative history makes plain that the substantive standard which the Panel was to use in setting rates is one of subsidy-free, fair market value. The Senate Judiciary Committee stated in its 1975 report:

"The compulsory license is intended to ease public broadcasting's transition from its previous not for profit exemption under the

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5. BMI also seeks not less than (i) 42.5 percent of all fees awarded (or voluntarily agreed to be paid) to ASCAP and BMI in the aggregate by the PBS stations or, expressed another way, (ii) 74 percent of the fees awarded (or voluntarily agreed to be paid) to ASCAP by the PBS stations.
  6. BMI also seeks not less than (i) 42.5 percent of all fees awarded (or voluntarily agreed to be paid) to ASCAP and BMI in the aggregate by the NPR stations or, expressed another way, (ii) 74 percent of the fees awarded (or voluntarily agreed to be paid) to ASCAP by the NPR stations.

existing copyright law. *As such, this provision does not constitute a subsidy of public broadcasting by the copyright proprietors since the amendment requires the payment of copyright royalties reflecting the fair value of the materials used.*"

S. Rep. No. 94-473, 1st Sess. at 101 (1975) (*ASCAP Direct Exh. 4*) (emphasis added). The House Judiciary Committee Report reiterated this point: "The Committee does not intend that owners of copyrighted material be required to subsidize public broadcasting." H.R. Rep. No. 94-1476, at 118 (1976) (*ASCAP Direct Exh. 3*).<sup>7</sup>

The parties before the Panel offered two competing methodologies by which to set subsidy-free, fair market royalty rates for the Public Broadcasters' use of BMI's and ASCAP's music. The Public Broadcasters offered a methodology based on the prior agreements between the parties. BMI and ASCAP offered a methodology (with some variations between them) based on the rates paid by commercial broadcasters.

Although the Panel agreed that BMI and ASCAP composers had, in fact, been subsidizing the Public Broadcasters under the prior agreements, the Panel adopted neither of the methodologies on which evidence was presented by the parties, but, instead, adopted a method

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7. This is similar to the task the CARP faced in setting fair market value rates for satellite carriers, *Rate Adjustment for the Satellite Carrier Compulsory License*, Docket No. 96-3 CARP SRA, 62 Fed. Reg. 55,742, 55,746 (Oct. 28, 1997), but is in contrast to the task the Panel would face, for example, in a proceeding under section 114, 115, or 116. *See, e.g., Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25,394, 25,400 (May 8, 1998) (The Register expressly contrasted the four factor test under section 114 with the "reasonable rate" test under section 118.); *see also* 17 U.S.C. § 801(b) (stating that determination of section 114, 115 and 116 rates "shall be calculated to achieve" certain statutorily defined objectives).

offered by no party to the proceeding, about which there was no affirmative evidence, and with respect to which BMI had no opportunity to present a case on rebuttal. Specifically, the Panel took as a benchmark the \$1.25 million fee set by the CRT in 1978 for ASCAP and attempted to adjust it for present purposes. The application of this method to BMI is particularly arbitrary. BMI took no part in the 1978 proceeding. The 1978 CRT decision did not set a fee for BMI. Almost nothing from the record of the 1978 proceeding was even in evidence in the current proceeding. BMI had no notice that the Panel intended to base the royalty rate for BMI on the 1978 CRT decision, and, therefore, had no opportunity to offer any evidence rebutting the use of such methodology with respect to BMI. In short, BMI had no notice and no opportunity to be heard — the hallmarks of fairness — with respect to the Panel's chosen methodology.

The Panel's methodology is also flawed on its own terms and rests on several assumptions that are contrary to the evidence. While the Panel accurately characterized the task before it in this proceeding as setting a subsidy-free, fair market value royalty rate, it adopted a method that failed to set such a rate. The Panel began with the unproven premise that the blanket license fee set by the CRT in 1978 for use of the ASCAP repertoire by the Public Broadcasters reflected fair market value in 1978. *Report 25*. The Panel then went on to apply that method to both ASCAP and BMI by using a formula to project the 1978 benchmark forward to the present. *Report 26*. The Panel erred both in its premise and in the formula it adopted to set the rate. The Panel also erred in that it lacked the data which it needed to make the calculations required by the formula, and resorted, instead to making arbitrary assumptions. In particular,

- the Panel erred in applying its method to BMI given that BMI was not even a party to the 1978 proceeding;
- in arriving at the fee, the Panel arbitrarily made certain assumptions about BMI's music use in 1978 about which there was no evidence in the record;

- the 1978 CRT decision stated on its face that it was not intended to be a guide for future determinations of reasonable royalties;
- the 1978 CRT decision did not state the basis upon which the 1978 fee for ASCAP was arrived at — but evidence in the record concerning the 1978 fee suggests that it was at least possible that this fee was not intended by the CRT to reflect fair market value, but in fact contained a subsidy;
- the Panel erroneously relied on 1978 revenue data — which was not even available to the CRT when it set the fee in 1978 — to trend the 1978 fee to take into account changed circumstances;
- the Panel failed to take into account that the Public Broadcasters' overall music use has changed since 1978 in projecting the 1978 CRT fee forward; and
- the Panel's fee-setting formula failed to take into account the commercialization of public broadcasting, which the Panel acknowledged had occurred since 1978, and the Panel decided, instead, that the Public Broadcasters should pay the same rate of revenue as they did in 1978.

The Panel's methodology was also flawed in that it failed to yield a fee that reflected the fair market value of BMI's music. In order to determine the subsidy-free, fair market value fee for the Public Broadcasters, it was necessary to examine what radio and television broadcasters who do not hold § 118 compulsory licenses (that is, the commercial broadcasters) pay for their BMI blanket licenses to use the identical music at issue in this proceeding. BMI presented un rebutted evidence showing that the Public Broadcasters are substantially similar to commercial broadcasters from the standpoint of music use. Specifically, BMI presented evidence of the similarities between public and commercial broadcast television in terms of the process of composing music, the time commitment involved in composing, and the similarities in the amount of up-front fees received. BMI presented evidence showing that despite these similarities, there has been a vast disparity in the back-end performance royalties a composer receives for music performed on public television as opposed to music performed on

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commercial television. For radio, commercially recorded compact discs and tapes are the mainstay of music use both in the public and for-profit stations.

One BMI witness, composer Michael Bacon, testified that in 1996 (when BMI received a fee of \_\_\_\_\_ per year from the Public Broadcasters) he received \_\_\_\_\_ for theme music in eighteen public television station performances of the "D-Day" episode of *American Experience* in 1996, whereas he would have received \_\_\_\_\_ had the identical music in the same episode been performed on eighteen commercial network-affiliated broadcast stations. *W.D. of Bacon 6*. This is a disparity of approximately 60 times for the performance of identical work through the same medium to the same viewers. Given that the evidence was clear that Public Broadcasters generally paid the same rates as commercial broadcasters for other programming inputs, the only explanation for this vast disparity was that Mr. Bacon — and all other BMI composers — have been subsidizing public broadcasting. Therefore, in order to prevent its composers from having to shoulder the burden of subsidizing public broadcasting, BMI asserted that the Public Broadcasters should pay rates comparable to those paid by commercial broadcasters.

The Panel agreed with much of BMI's position in its Report. The Panel agreed that BMI and ASCAP had been voluntarily subsidizing the Public Broadcasters under the prior agreements. *Report 22-23*. The Panel also acknowledged both that the Public Broadcasters had become increasingly commercial and that this increasing commercialization justified an increase in the rate to be paid by the Public Broadcasters. The Panel noted that it was "patent to even a casual observer" that the "Public Broadcasters have become 'commercialized' in recent years, and appear more similar to commercial broadcasters." *Report 24*. Moreover, the Panel correctly pointed out that there were "no factual bases to account for the huge disparity between the recent

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ASCAP/BMI commercial rates and the rates for Public Broadcasters under the prior agreements (even after adjusting commercial rates based upon various parameters). . . . To the contrary, it appears that Public Broadcasters pay rates competitive with commercial broadcasters for other music-related programming costs such as composers' 'up-front fees'." *Report 23*. And the Panel properly rejected the Public Broadcasters' circular argument that prior agreements between the parties, by definition, constituted the subsidy-free fair market value of the licenses simply because they had been agreed to without resort to litigation. *See Report 20*.

The Panel went on to express concern about the size of the disparity between the rates under the prior agreements with the Public Broadcasters and those paid by the commercial broadcasters. "It is the *magnitude* of the disparity that causes the Panel to further question whether the rates negotiated under prior agreements truly constituted fair market rates." *Report 23*. Under the agreements in effect in 1993-1997, the Public Broadcasters paid an annual fee to BMI of                    whereas BMI received approximately                    million from the commercial broadcasters for the identical blanket license at issue in this proceeding for 1996. *BMI PFFCL 5*.

The Public Broadcasters offered no evidence in the proceeding that they pay less than commercial broadcasters for any programming inputs, whether actors, screenwriters, electricians, or cameras. The Panel partially recognized this:

"If, for example, evidence had been adduced demonstrating that Public Broadcasters pay less than commercial broadcasters for other music-related programming expenses (such as disk jockeys, musicians, producers, writers, directors, or equipment operators), the Panel might feel more comfortable accepting the heavily discounted music license fees as fair market rates. Virtually no such evidence was adduced."

*Report 23*. Given that a principal task of the Panel was to ensure that BMI's composers do not subsidize Public Broadcasters, there was no reason presented in the record for BMI composers to

be treated any differently from the providers of other programming inputs. The Public Broadcasters should pay the same rate for music as other American broadcasters.

It is important to understand that BMI did not take the position that the Public Broadcasters should pay the same *amounts* as commercial broadcasters. Rather, BMI recognized that public broadcasting has smaller revenues, smaller audiences, and smaller programming expenditures than the for-profit part of their industry. BMI took the position, therefore, that it was necessary for Public Broadcasters to pay the same *rate* as commercial broadcasters only after making adjustments for differences in size. Thus, BMI's method for determining a fee in this proceeding adjusted the commercial rates to take into account the size differences between the Public Broadcasters and the commercial broadcasters based on revenues, programming expenditures, audience size, and intensity of music usage. After taking these differences into account, BMI demonstrated that in order for the Public Broadcasters to pay fees comparable to the other broadcasters, it would be necessary to set a fee for public television in a range between \$4 million to \$6 million and for public radio between \$1 million to \$2 million. BMI proposed a fee of \$6.895 million for both public television and public radio, which was approximately the middle of these ranges.

As noted, although the Panel properly expressed its concern about the size of the disparity between the fees previously paid by the Public Broadcasters and those paid by the commercial broadcasters, and although the Panel went some way towards diminishing this disparity, the Panel nonetheless went on to set a fee which would continue to yield a vast disparity, and, therefore, would continue to require BMI composers to subsidize the Public Broadcasters. The Panel's rate needs to be increased substantially to eliminate the subsidy.

The Panel's fee and method should be set aside, and the Librarian should adopt the method proposed by BMI so as to close the gap between the royalties received by composers and publishers whose work is performed by the Public Broadcasters and by those whose work is performed by commercial broadcasters.

If the Librarian determines not to reject entirely the Panel's method using the 1978 CRT fee as a benchmark, the Librarian should modify the fee award to reflect more accurately the changes that have taken place to public broadcasting over the 20 years since that fee was set.

At a minimum, the following modifications in the Panel's Report are warranted by the evidence, even if the 1978 benchmark is accepted.

1. Changes In Public Broadcasting Since 1978

- (i) Taking Into Account Changes In Public Broadcasting's Revenues: The Panel used changes in public broadcasting's total revenues as a proxy for the changes that have taken place in public broadcasting since the CRT set the 1978 fee. Even if an examination of total revenues (rather than private revenues) were the appropriate proxy, given that a fee set 20 years ago is being used as a benchmark to set a fee for today, the Panel would need to adjust that benchmark to take in account the changes in public broadcasting's revenues over the last 20 years in order to accommodate fully the changes in public broadcasting. The Panel erred in that it took into account only changes that took place in public broadcasting over an 18-year period rather than a 20-year period. Specifically, it compared the Public Broadcasters' 1978 revenues — data which were not even available to the CRT Panel when it set the 1978 fee — with the Public Broadcasters' 1996 revenues — the most current data available in this proceeding. By doing so, the Panel failed to account fully for the changes that took place in public broadcasting since the 1978 CRT fee was set, and, therefore, it failed — on its own theory — adequately to adjust that

fee for today's circumstances. The Panel ought to have adjusted the 1978 benchmark on the basis of changes to public broadcasting revenues over a 20-year period. The most plausible way to do this is to compare the Public Broadcasters' 1976 revenues — the most recent revenue data available to the CRT Panel when it set the 1978 fee — with the Public Broadcasters' 1996 revenue data — the most current data available in this proceeding. Adjusting the 1978 CRT fee to fully accounting for the changes in public broadcasting's total revenues over the last 20 years would result in a fee to BMI of \$2.845 million. *See* pages 27-29 *infra*.

(ii) Taking Into Account Changes In Public Broadcasting's Music Use: The Panel agreed that if the Public Broadcasters are using more music today than they were in 1978, they should pay a relatively larger royalty rate than in 1978. Even though there was evidence demonstrating that Public Broadcasters now have over twice the number of stations than they did in 1978 and that they are broadcasting at least 69 percent more hours of programming on public television than they were in 1978, the Panel arbitrarily assumed, contrary to this evidence, that the Public Broadcasters' use of music has remained static since 1978. While no party to this proceeding submitted evidence of public broadcasting's overall music use in 1978 so as to enable a comparison to be made with its music use today, there was evidence demonstrating that there had been a 10 percent increase in public broadcasting's overall music use between 1992 and 1996. At the very least the Panel ought to have taken this into account in adjusting the 1978 fee. Adjusting the 1978 benchmark to take into account this 10 percent increase in public broadcasting's overall music use would yield a fee to BMI of \$2.335 million. *See* pages 29-33 *infra*.

The Librarian should modify the Panel's award to account for both changes in public broadcasting set forth above — changes in revenues and changes in music use. This would yield a fee to BMI of \$3.128 million. *See page 34 infra.*

2. The Increasing Commercialization Of Public Broadcasting Since 1978

The modifications set forth above take the Panel's method on its own terms, and seek to modify the application of the Panel's method so that it accurately takes into account changes in public broadcasting's total revenue and overall music use over the last 20 years. BMI asserts that the evidence warrants an additional modification to the Panel's method — one to account for the increasing commercialization of public broadcasting over the last 20 years.

The Panel acknowledged that public broadcasting has become increasingly commercial in recent years, and that this increasing commercialization alone would justify an adjustment to the royalty rate to be set in this proceeding. The Panel stated: "That Public Broadcasters have become more commercialized in recent years . . . is patent even to a casual observer. . . . Indeed this convergence may justify a *narrowing* of the vast gap between license rates paid by Public Broadcasters and those paid by commercial broadcasters." *Report 24.* Having acknowledged this, however, the Panel failed to adjust the 1978 CRT fee to take into account the increasing commercialization since 1978. The Panel ought to have projected the fee on the basis of the growth of public broadcasting's private revenues rather than its total revenues, as the growth in private revenues serves as a reasonable proxy for assessing the increasing

commercialization of public broadcasting. Projecting on the basis of private revenues alone would yield a fee to BMI of \$3.52 million.<sup>8</sup> See pages 35-38 *infra*.

Using the Panel's method on the basis of the growth in private revenues, and taking into account the 10 percent increase in public broadcasting's overall music use since 1978 would yield a fee to BMI of \$3.87 million. See page 39 *infra*.

\* \* \*

The Panel's Report no doubt reflects conscientious consideration on its part, and the Panel was correct on many points. The Panel was correct in finding that the prior agreements did not constitute a valid benchmark for setting fees in this proceeding; the Panel was correct in respecting the no-precedent clauses in the prior BMI and ASCAP agreements; and the Panel was correct in finding that BMI and ASCAP have been voluntarily subsidizing the Public Broadcasters under the prior agreements. In addition, the Panel's Report yielded a substantial fee increase for BMI over prior periods. BMI appreciates this. Nevertheless, perhaps in the perceived interest of striking a balance between and among the parties or because of pragmatic concern about making too large a change in the status quo, the Panel chose not to follow through on the logic of its fee methodology to yield a fee that truly eliminated the subsidy contained in the prior rates. This was contrary to the Panel's statutory mandate and was arbitrary. BMI asks the Librarian to correct this error.

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8. Applying BMI's methodology, which uses commercial broadcasters' music fees as the benchmark, on the basis of private revenues alone would yield a fee to BMI of \$3.65 million — similar to that yielded by applying the Panel's methodology on the basis of private revenues alone. See page 38 *infra*.

### Standard of Review

The Librarian's review of the Panel's determination is governed by 17 U.S.C. § 802(f) (1996). Pursuant to that statutory directive, the Librarian must reject and vacate the Panel's determination if the Librarian finds that it is "arbitrary or contrary" to applicable provisions of law. 17 U.S.C. § 802(f). If the Librarian rejects the determination, the Librarian must, "after full examination of the record created in the arbitration proceeding," substitute his own decision in the proceeding based on the record. *Id.*<sup>9</sup>

The Librarian has previously had the opportunity to consider the scope of review under section 802(f), as well as his obligations with respect to reviewing a Panel's determination under the "arbitrary" standard set forth in the Copyright Act. The Librarian has recognized that "there is no reason to conclude that the use of the term is any different from the 'arbitrary' standard described in the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A)." *Digital Proceeding*, 63 Fed. Reg. at 25,398. The Librarian has conducted a "[r]eview of the case law applying the APA 'arbitrary' standard" and has found that there are "six factors or circumstances under which a court is likely to find that an agency acted arbitrarily . . . ." *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983); *Celcom Communications Corp. v. FCC*, 789 F.2d 67 (D.C. Cir. 1986); *Airmark Corp. v. FAA*, 758 F.2d

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9. Under Section 802(f), "[i]t is the task of the Register [of Copyrights] to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination." *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25,394, 25,399 (May 8, 1998) ("*Digital Proceeding*").

685 (D.C. Cir. 1985)); *see also Rate Adjustment for the Satellite Carrier Compulsory License*, Docket No. 96-3 CARP SRA, 62 Fed. Reg. 55,742, 55,745 (Oct. 28, 1997) ("*Satellite Proceeding*"). Thus, the Librarian has previously considered a Panel's determination to be arbitrary and subject to reversal when the Panel does any of the following in rendering its Report:

- "1. It relies on factors that Congress did not intend it to consider;
- "2. It fails to consider entirely an important aspect of the problem that it was solving;
- "3. It offers an explanation for its decision that runs counter to the evidence presented before it;
- "4. It issues a decision that is so implausible that it cannot be explained as a product of [the Panel's] expertise or a difference of viewpoint;
- "5. It fails to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made; and
- "6. Its action entails the unexplained discrimination or disparate treatment of similarly situated parties."

*Digital Proceeding*, 63 Fed. Reg. at 25,398.

In addition, the Panel must base its findings on "substantial evidence." *See Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1152 (7th Cir. 1982); 5 U.S.C. § 706(2)(E) (1996). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *accord Chrysler Corp. v. United States Envtl. Protection Agency*, 631 F.2d 865, 890 (D.C. Cir. 1980). Consistent with that obligation, the Panel should not disregard evidence without articulating a basis for

doing so. For example, in *Determination of the Distribution of the 1991 Cable Royalties in the Music Category*, the Librarian noted that the CARP had carefully weighed all the evidence presented by a *pro se* claimant and had articulated reasons for rejecting that evidence. Docket No. 94-3 CARP CD 90-92, 63 Fed. Reg. 20,428 (April 24, 1998).

Applying the standards set forth above to the Panel's determination, it is clear that the Panel acted arbitrarily in adopting the method it did to determine the royalty rates and in rejecting the method offered by BMI.

### Argument

The Panel accurately identified the task before it in the proceeding: namely to determine the fair market value of BMI and ASCAP licenses to the Public Broadcasters. The Panel stated that "a determination of fair market value requires the Panel to find the rate that the Public Broadcasters *would* pay to ASCAP and to BMI for the purchase of their blanket licenses, for the current statutory period, in a hypothetical free market, in the absence of the Section 118 compulsory license." *Report 9-10*.

The Panel was also correct in defining the terms "fair market value." The Panel noted that the parties agreed that "'fair market value' means the price at which goods or services *would* change hands between a willing buyer and a willing seller neither being under a compulsion to buy or sell and both having reasonable knowledge of all material facts." *Report 9*.

The Panel also correctly noted that "[b]oth the Senate Judiciary Committee Report and the House Judiciary Committee Report contain language expressing the view that the compulsory license requires payment of a 'fair value' license fee that does not constitute a 'subsidy' by copyright owners to public broadcasters." *Id.*

The Panel erred not in its articulation of the task before it, but in the method it adopted to determine the royalty rate. Specifically, the Panel began with the premise that the blanket license fee set by the CRT in 1978 for use of the ASCAP repertoire by the Public Broadcasters reflected fair market value in 1978, even though it concluded that the next three sets of licenses spanning 15 years, in fact, contained voluntary subsidies, and did not reflect fair market value. *Report 25*. The Panel then went on to set a fee by using a formula to project the 1978 benchmark forward to the present. *Report 26*.

The method adopted by the Panel was flawed in two fundamental ways: its method and its outcome. The Panel adopted a formula to set the royalty rate which rested on the erroneous assumption that the 1978 CRT decision represented an appropriate benchmark, and the Panel then failed to adjust that benchmark rate adequately to take into account current circumstances. In addition, the Panel adopted a formula, yet lacked the data to make the calculations required by that formula, and instead relied on certain arbitrary presumptions. As a result, the Panel failed to award BMI a fair market value, subsidy-free rate.

In order to set a fair market value, subsidy-free rate, the Librarian should set aside the method adopted by the Panel, and adopt that offered by BMI. Alternatively, the Librarian should modify the method adopted by the Panel, and increase the fee yielded by that method to take into account the growth in the Public Broadcasters' revenues over the last 20 years, the growth in the Public Broadcasters' music use since 1978, and the increased commercialization of the Public Broadcasters since 1978.

#### **I. THE PANEL'S METHOD OF DETERMINING THE FEE WAS ARBITRARY.**

The Panel's formula for determining the fee involved four steps: (i) starting with the premise that the 1978 CRT fee is an appropriate benchmark for setting the fee in the future;

(ii) determining the percentage of Public Broadcasters' 1978 revenues that the 1978 CRT fee constituted; (iii) applying this percentage of revenues to the 1996 Public Broadcasters' revenues; and (iv) making adjustments as to changes in relative music shares as between ASCAP and BMI between 1978 and 1996. *See Report 26-27.*

As a threshold matter, the application of such a methodology to BMI was particularly arbitrary because BMI was not a party to the 1978 proceeding and BMI had no opportunity in this proceeding to present any evidence rebutting the method adopted by the Panel. In addition, almost every aspect of the Panel's formula is flawed: (i) the Panel erred in its assumption that the 1978 CRT fee in fact represented fair market value at that time; (ii) the Panel erred in using the 1978 revenues of public broadcasting to project that fee into the present in light of the fact that only 1976 revenue data were available to the CRT when it set the 1978 fee; (iii) the Panel failed to make an adjustment for the increase in overall music use by Public Broadcasters since 1978; (iv) while the Panel acknowledged the increased commercialization of public broadcasting since 1978 and accepted the effect such commercialization should have on the reasonable royalty rate, the Panel failed to make an adjustment to take this into account; and (v) the Panel made an arbitrary assumption about the relative music shares of ASCAP and BMI back in 1978 in order to apply its formula.

**A. The Panel's Selection of The 1978 CRT Determination As The Benchmark Was Contrary To The Evidence And Was Arbitrary.**

**1. The Panel's Decision To Rely On The 1978 CRT Fee Was Especially Arbitrary As To BMI.**

The last rate proceeding to determine music licensing fees for public broadcasting was in 1978 — 20 years ago. BMI was not a party to that proceeding and had no opportunity to

present any evidence in that proceeding as to the appropriate rate for the use of its music at that time. Not only was BMI not a party to the 1978 proceeding, but also BMI had no opportunity in *this* proceeding to offer evidence as to the appropriateness of using the 1978 fee as a benchmark to determine BMI's fee. No party in this proceeding took the position that the 1978 ASCAP fee should be used as a benchmark.<sup>10</sup> Therefore, no party submitted evidence supporting or opposing use of the 1978 CRT determination as a benchmark. Furthermore, the Panel did not give advance notice to any of the parties that the Panel was considering reliance on the 1978 fee as a benchmark to set a fee in this proceeding. Thus it had no opportunity to present a rebuttal case — a right granted by the CARP rules — with respect to the use of the 1978 fee as a benchmark. As a result, BMI did not attempt to present evidence as to the use of the 1978 fee as a potential benchmark.

In addition to this procedural flaw, the choice of the 1978 ASCAP fee appears infected by another legal error. At closing argument, after the close of the evidentiary record in this case, the Panel, to BMI's surprise, first inquired of BMI's counsel whether he believed the Panel was bound by the rate determined as of 1978 by the CRT. The transcript states:

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10. As a check on its fee proposal, ASCAP offered the Panel the mathematical observation that the fee awarded in 1978, translated into a percentage of *private* source revenues of the Public Broadcasters, could yield a fee similar to the one it was seeking herein *if* adjustments for supposed changes in ASCAP music usage were also made. *W.D. of Boyle 9-11*. Since this ASCAP approach was *sui generis* to it, was not advocated as applicable to BMI, and yielded fees in line with what BMI was seeking, BMI had no reason to address it. The Panel noted that ASCAP did not "*appear* to rely upon this approach as an affirmative fee-generating methodology." *Report 25 n.35* (citing *W.D. of Boyle 9-11*); *ASCAP PFFCL 115-17*. In any event, the Panel did not adopt ASCAP's calculation but simply chose one element of it to serve as the benchmark for both it and BMI.

"JUDGE GULIN: I asked Mr. Schaeffer about the 78 CRT decision, and whether that represents binding precedent in terms of the rate. Let me see if I have the language they use in their decision. They say the CRT does not intend that the adoption of this schedule should preclude active consideration of alternate approaches in a future proceeding.

"So clearly they are not indicating that we are bound by any particular approach. We are obviously looking at alternate approaches. But in terms of the rate, are we bound by their finding that was the appropriate fair market value rate as of 1978?

"Do you have a position on that, Mr. Kleinberg?

"MR. KLEINBERG: Yes. Well first of all, BMI was not a participant in that proceeding.

"JUDGE GULIN: I mean for ASCAP.

"MR. KLEINBERG: I understand. We don't believe that that would constitute binding precedent with respect, because it's a [f]inding basically of fact. It is a conclusion.

"It would not be precedential in the way we talk about precedents in the legal context where it would then mean that would be the rate that you would have to apply later on."

*Tr. 4107-08.* Eventually, the Panel equivocated on this point, stating that it "is arguably bound by the 1978 definition of [this] fair market value of the ASCAP license." *Report 25.*

The Panel erred to the extent it felt itself bound by the 1978 fee as to BMI. It is settled that any finding made by the 1978 CRT cannot as a matter of law bind BMI, as BMI was not a party to the 1978 proceeding and did not have an opportunity to litigate fully and fairly any finding made in that proceeding. *Martin v. Wilks*, 490 U.S. 755, 762 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."); *accord Consumers Union of United States, Inc. v. Consumer Prod. Safety Comm'n*, 590 F.2d 1209, 1221 (D.C. Cir. 1978), *rev'd on other grounds*

*sub nom. Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375 (1980) ("A judgment cannot bind those who were not before the court either in person or through some sort of representative."); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593 (1974) ("[T]he general rule is that nonparties to the first action are not bound by a judgment or resulting determination of issues. . . ."); *see also Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996) ("The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected . . . has litigated or had an opportunity to litigate the same matter in a court of competent jurisdiction.") (citation omitted); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979).<sup>11</sup>

**2. The Panel's Assumption That The 1978 CRT Fee Is An Appropriate Benchmark Was Arbitrary.**

In any case, the Panel's decision to adopt the 1978 CRT fee as a benchmark of fair market value for the future was not supported by "substantial evidence," *Amusement & Music Operators*, 670 F.2d at 1152, and was "so implausible that it cannot be explained as a product of the Panel's expertise or a difference of viewpoint." *Digital Proceeding*, 63 Fed. Reg. at 25,398.

No evidence was adduced in the present proceeding which supports the Panel's assumption that the 1978 fee constituted fair market value in 1978. In fact, the portion of the record of the 1978 proceeding that was incorporated into the record in this proceeding casts

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11. Even as to ASCAP, the CRT itself expressly adopted the rate "on the basis of the record made in [that] proceeding." *Use of Certain Copyrighted Works by Noncommercial Broadcasting*, 43 Fed. Reg. 25,068, 25,069 (Feb. 28, 1978). The CRT made a specific factual finding as to the license fee rate for ASCAP based on a specific set of factual circumstances on a specific record 20 years ago. The CRT recognized that it was doing so in its decision.

serious doubt on whether the fee set in the 1978 proceeding was ever intended to constitute a subsidy-free, fair market rate. The CRT's two-and-a-half-page decision did not indicate what approach it was following in setting the ASCAP rate. The CRT decision stated only that the "amount of the payment is approximately what would have been produced by the application of several formulas explored by this agency during its deliberations." 43 Fed. Reg. at 25,069. One of these approaches — that proposed by ASCAP — was to take the prevailing rates paid by the commercial broadcasters and "voluntar[ily] reduc[e]" them "in keeping with concessions made by some other suppliers of goods and services to public broadcasting" — in effect, granting a subsidy to public broadcasting. *PB Exh. 27X at 10*; see also Post Hearing Statement of the American Society of Composers, Authors and Publishers, at 66 (April 10, 1978) (ASCAP proposed to discount the proposed rate downward by a range of twenty to fifty percent).

In a subsequent article concerning the 1978 Proceeding, ASCAP representatives noted that ASCAP had made it clear in the CRT proceeding that it wanted to give the Public Broadcasters a discount for the first license for 1978 to 1982. The ASCAP representatives stated that "given the special role of public broadcasting in American society, ASCAP expressed its willingness to offer a discount, *at least for the initial license term*." *ASCAP Direct Exh. 19 at 31* (emphasis added). Thus, ASCAP proposed a reasonable fee of \$3.6 million, which it discounted by 50 percent for 1978 to yield a fee request of \$1.8 million. *Id. at 36*. ASCAP also proposed that this discount be reduced each year so that it would be 20 percent by the end of the license term in 1982. *Id.* The Public Broadcasters' final proposal in that proceeding was a fee of about \$750,000 per year. *Id. at 38*. The final fee set by the CRT — \$1.25 million — fell almost midway between the subsidized rate proposed by ASCAP for 1978 — \$1.8 million, and that proposed by the Public Broadcasters — \$750,000.

Thus, the evidence suggests that the 1978 CRT rate set for ASCAP, in fact, contained a subsidy for the initial license term of 1978-1982 — a discount ASCAP had indicated it wished to grant the Public Broadcasters for those years. At the very least, this evidence casts doubt on whether the 1978 CRT-set fee did constitute fair market value for 1978. In these circumstances, the 1978 fee would be entirely inappropriate as a basis for future rate-setting.

Not only did ASCAP propose giving the Public Broadcasters a discount in the 1978 proceeding, but also during the course of that proceeding ASCAP requested that the 1978 CRT decision be considered nonprejudicial as to future proceedings:

"ASCAP had asked that the fee set by the CRT be considered as nonprejudicial as to future proceedings, given the total lack of experience in licensing public broadcasting through the compulsory license or otherwise and the fact that this was the first experience for both the parties and the CRT in this type of rate-making."

*ASCAP Direct Exh. 19 at 41.*

Following ASCAP's request, the 1978 CRT majority noted that its decision — including the rate that it set — was not intended as a precedent for future proceedings:

"The CRT has determined that a payment of \$1,250,000 per year is a reasonable royalty fee for the performance by PBS, NPR and their stations of ASCAP music. . . .

"The CRT has adopted this schedule on the basis of the record made in this proceeding. When this matter again comes before the CRT, the CRT will have the benefit of several years experience with this schedule. *The CRT does not intend that the adoption of this schedule should preclude active consideration of alternative approaches in a future proceeding.*"

43 Fed. Reg. at 25,069 (emphasis added).

In this cautionary language the 1978 CRT made it clear that the approach it took and the fee it reached based on that approach were experimental. Recognizing that it was setting

a royalty rate for the Public Broadcasters' use of ASCAP music for the first time, it was explicitly clear that it did not intend the fee it set in 1978 to dictate rates to be set in the future.

Accordingly, the Panel's decision in this case to accept the CRT rate as a benchmark is clearly contrary to the directive in the 1978 CRT decision *not* to use the CRT's determination as a benchmark.

Given the CRT's statement that the 1978 fee was non-precedential, the Panel's decision to rely on the 1978 fee as a benchmark is particularly arbitrary in light of the fact that the Panel correctly rejected the subsequent agreements between the parties as a benchmark because they were intended to be non-precedential. *Report 22-23*. The Panel should have rejected reliance on the 1978 CRT fee for the same reason.<sup>12</sup>

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12. In addition, the Panel could not rely on the 1978 fee agreed between BMI and the Public Broadcasters as a benchmark because, as the CRT noted, the BMI fee itself was based on the ASCAP fee. The CRT expressly disavowed *any* use of the BMI agreed-upon fee in determining the ASCAP fee as "traveling in a circle" because the BMI agreed-upon fee would by its terms be automatically adjusted upward or downward depending on whatever ASCAP fee was agreed upon or set by the CRT. 43 Fed. Reg. at 25,068-69. The CRT made this abundantly clear in its decision:

"Concerning performing rights in musical works, the CRT found that the agreement between Broadcast Music, Inc. (BMI) and Public Broadcasting Service and National Public Radio (NPR) neither in its structure or rate of royalty payment was of assistance to the CRT in establishing a royalty schedule for the repertory of the American Society of Composers Authors and Publishers (ASCAP). The BMI agreement is subject to an adjustment related to the ratio of performances of BMI music to total performances of copyrighted music. That ratio is to be applied to the total fees paid for music and, if appropriate, an adjustment is to be made in the fees paid to BMI. It would be the equivalent of traveling in a circle for the CRT to now utilize the BMI agreement as the basis for establishing a reasonable royalty schedule for the use of ASCAP music."

(Footnote continued on next page)

Moreover, the evidence that the 1978 CRT determination contained a subsidy of at least 50 percent casts doubt on whether the Panel in this proceeding could simply assume, without analysis, that the 1978 fee represented a fair market value rate. *Report 25* ("Our approach is predicated on the fundamental assumption that the blanket license fee set by the CRT in 1978 . . . reflects the fair market value of that license as of 1978."). At the very least, the Panel acted arbitrarily in failing to make an independent determination of whether the 1978 CRT fee did in fact represent fair market value at that time, before choosing it as the benchmark. Specifically, the Panel — in making a "fundamental assumption" that the 1978 fee represented fair market value at that time — "fail[ed] to consider entirely an important aspect of the problem that it was solving," and "it offer[ed] an explanation for its decision that runs counter to the evidence presented before it." *Digital Proceeding*, 63 Fed. Reg. at 25,398.

Reliance on the 1978 CRT decision as a benchmark of fair market value in music license rates is also arbitrary for an additional reason. At the time of the 1978 proceeding, the Public Broadcasters argued that the commercial broadcasters' fees could not be used as a benchmark to set public broadcasting fees because the levels of commercial fees were uncertain as a result of the major antitrust cases then pending against BMI and ASCAP. *W.R. of Berenson* 9. See *Columbia Broad. Sys., Inc. v. American Society of Composers, Authors & Publishers*, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom. Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979), *aff'd*, *Columbia Broad. System, Inc.*

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(Footnote continued from previous page)

43 Fed. Reg. at 25,068-69. In other words, if the CRT fee for ASCAP was not intended to be used in future proceedings, it follows that the BMI 1978 fee was also non-precedential because it was based on the ASCAP fee.

*v. American Society of Composers, Authors & Publishers*, 620 F.2d 930 (2d Cir. 1980) (network television); *Buffalo Broad. Co. v. American Society of Composers, Authors & Publishers*, 744 F.2d 917 (2d Cir. 1984) (local television). The music license fees for commercial television continued to be uncertain until 1996, because they were the subject of litigation seeking radical changes from the interim rates paid throughout the prior period. *BMI PFFCL* 8. Thus, when this proceeding was commenced, the commercial fees — at least in the case of television — had become certain for the first time in about 20 years. As a result of the *CBS* and *Buffalo Broadcasting* cases, the CRT in 1978 did not — according to the Public Broadcasters themselves — have available to it the information needed to use the fees paid by commercial broadcasting as the benchmark. Despite this, the Panel in this case made no effort to explore how and why the 1978 rate was set, but simply made the "fundamental assumption that the blanket license fee set by the CRT in 1978, for use of the ASCAP repertory by Public Broadcasters, reflects the fair market value of that license as of 1978." *Report* 25.

Because the choice of a benchmark was the single most crucial finding of fact the Panel was required to make, the "fundamental assumption" that the benchmark chosen represented fair market value in 1978 renders its entire decision "arbitrary."

**B. The Panel's Formula Failed Adequately To Adjust For Changes In Public Broadcasting Since 1978.**

Not only is the fee set forth in the 1978 CRT decision an inappropriate benchmark to use to find a fair market value fee, but the Panel also made arbitrary assumptions in attempting to adjust that benchmark to take into account changes in public broadcasting over the last 20 years.

The Panel recognized that it could not simply take the 1978 CRT-set fee and apply it today without taking into account changes in circumstances over the last 20 years. The Panel failed adequately to take into account these changes in circumstances, however.

Specifically, the Panel's adjustment formula was arbitrary because: (i) the Panel took into account only changes over 18 years rather than 20 by erroneously relying on 1978 revenue data as the base from which to project the fee forward — data which were not even before the CRT when it set the 1978 rate; (ii) the Panel arbitrarily assumed, despite the fact that there are over twice as many public broadcasting stations now as there were in 1978, that the Public Broadcasters use the same amount of music now as they did then; and (iii) the Panel arbitrarily assumed that the Public Broadcasters should pay the same rate of revenue now as they did in 1978 despite the increased commercialization of the Public Broadcasters since that time.

In the event that the Librarian decides not to reject the Panel's method entirely, the Librarian should at least modify the Panel's fee determination to take into account the changes in public broadcasting revenues over a 20-year period from 1976-1996, the increased commercialization of the Public Broadcasters since 1978, and the growth in the overall amount of music used by them.

**1. The Panel Failed To Take Into Account The Total Increase In The Public Broadcasters' Revenues.**

The Panel's method was to rely on the CRT fee set for the period 1978 to 1982, as a basis to set a fee for a five-year period commencing exactly 20 years later — 1998 to 2002. The Panel stated that in order to project this fee forward, it was necessary for the Panel to take into account changes in public broadcasting's total revenues because this is "the best indicator of

relevant changed circumstances which require an adjustment of the chosen benchmark." *Report* 27.

In carrying out a revenue analysis, the Panel decided to rely on revenue data from 1978 rather than 1976. *See Report* 26. This decision was wrong for two reasons. First, the CRT did not have the 1978 revenue data available to it when it set the 1978 fee; it had only the 1976 revenue data. *PB Reply PFFCL Appendix A at 1; ASCAP Exh. 19 at 32*. Second, the Panel's method seeks to use a fee set in 1978 as a benchmark to set a fee for a period commencing 20 years later — 1998. To the extent that the Panel seeks to use changes in revenues as "the best indicator of relevant changed circumstances," it should have looked at changes that took place over a 20-year period to adjust the benchmark fee. Thus, the Panel should have relied on the 1976 revenue data — the most recent data available in the 1978 proceeding — and compared it with the 1996 revenue data — the most recent data available in this proceeding. *Report* 25-26. The Panel, therefore, acted arbitrarily in comparing 1978 revenue data with 1996 revenue data, because it took into account changes in public broadcasting that took place only over an 18-year period, rather than a 20-year period.

The 1976 total revenues of the Public Broadcasters were \$412.2 million. *PB Reply PFFCL Appendix A at 3*. Applying this data and using the Panel's method, yields the following result:

$$\begin{aligned}
 \text{ASCAP Fee} &= \frac{1978 \text{ CRT License Fee}}{1976 \text{ PB Total Revenues}} \times 1996 \text{ PB Total Revenues} \\
 &= \frac{\$1.25 \text{ million}}{\$412.2 \text{ million}} \times \$1.956 \text{ billion} \\
 &= \$5.933 \text{ million}
 \end{aligned}$$

Using Panel's method  
for adjustment for  
decline in ASCAP's  
music share

$$= \$5.933 \text{ million} \times .75 = \$4.50 \text{ million for ASCAP fee}$$

Using Panel's method  
for adjustment for  
increase in BMI's  
music share

$$= \$4.50 \text{ million} \times .63934 = \$2.845 \text{ million for BMI fee}$$

## 2. The Panel Failed To Take Into Account The Increase In Public Broadcasting's Overall Use Of Music Since 1978.

The Panel accepted that its 1978 benchmark could rationally be applied 20 years later only if it were adjusted for music usage differences since that time. *Report 31-32*. This makes sense: if Public Broadcasters are using more music overall, now, than they were in 1978, that, alone, would warrant an increase in the royalty fee they should pay.

The Panel's method was flawed because there was no evidence of Public Broadcasters' overall music use in 1978. Instead of acknowledging that it had no music usage information for 1978 and that the 1978 fee was therefore unusable as a benchmark, however, the Panel went ahead with its 1978 benchmark on the basis of an arbitrary "presum[ption]" that there has been no change in Public Broadcasters' music use over the last 20 years. Thus the Panel wrote:

"[g]iven the dearth of empirical, or even anecdotal, evidence to the contrary, it is reasonable to presume that overall music usage by Public Broadcasters has remained substantially constant since 1978. See *ASCAP PFFCL 152* ('[T]here is no evidence in the record that total music use on the [Public Television and Public Radio] Stations has changed significantly since 1978.')

*Report 32.* The Panel's presumption is arbitrary and contradicted by the record.

Because the "Public Broadcasters" was a dramatically different set of stations 20 years ago, with fewer than half the stations than now, and a different slate of programs, it is patently arbitrary to "presume," without analysis, that the Public Broadcasters use a "substantially constant" amount or intensity of music today as they did 20 years ago. Unfortunately, the Panel did not have — nor did it request — any evidence of the overall music usage in public broadcasting 20 years ago. Therefore, it had no basis for comparison with overall music usage in 1996 — the most recent year for which data is available — with the Public Broadcasters' use of music in 1978.

More significantly, all the evidence in the record concerning changes in the Public Broadcasters over time directly contradicts the Panel's presumption that public broadcasting's music usage has remained static over the last 20 years. The Public Broadcasters' own data, set forth in the table below, demonstrates that while 763,464 hours of programming were broadcast by public television in 1978, 16 years later in 1994 this figure had grown to 1,287,000 hours. This is an increase of 523,536 hours, or 69 percent.

REDACTED

	Public Television	1978	1994
(1)	Number of Broadcasters	156	198
(2)	Average Annual Hours Per Broadcaster	4,894	6,500
(3)	Average Annual Hours on Public Television (1) x (2)	763,464	1,287,000

*PB Direct Exh. 3 Table 1 Part 1.* In circumstances where the Public Broadcasters were broadcasting 69 percent more hours of programming in 1994 than in 1978, it was simply unwarranted for the Panel to "presume" that the Public Broadcasters' music usage has been static over the last 20 years.

Moreover, the Public Broadcasters' own data show that there was an increase in overall use of music per hour per station by public broadcasting of over 7 percent *in the last five years alone* — from 1992-1996. *W.R. of Jaffe 26.* BMI's data show that there was an increase of over the same period. *W.R. of Willms 3.* And, as noted, public broadcasting now includes more than double the number of stations than it did in 1978. *ASCAP PFFCL 36.*

The Panel's decision to "presume" that there was no change in the Public Broadcasters' use of music over the last 20 years is, therefore, arbitrary, given the evidence suggesting an increase in music use since 1978. Even in the absence of solid data on music use in 1978, it was just as arbitrary for the Panel to assume that there was no change in music as it would have been for the Panel to have made a 10 percent downward or 10 percent upward adjustment on the same lack of evidence. Yet such an adjustment makes all the difference to determining the rates using the Panel's benchmark and formula. Since there is no solid evidence as to overall music usage by the Public Broadcasters in 1978, the Panel's methodology is unworkable and must be rejected.

REDACTED

If the Librarian chooses not to reject the Panel's methodology entirely as a result of the Panel's flawed "presum[ption]" about changes in music use since 1978, the Librarian should at a minimum modify the Panel's fee award to take into account the undisputed increase in music usage per station that had taken place since 1992 — which the evidence demonstrated to be approximately 10 percent.

This 10 percent increase would be calculated as follows on the basis of the Panel's method (taking into account the 1978 total public broadcasting revenues):

$$\begin{aligned}
 \text{ASCAP Fee} &= \frac{\text{1978 CRT License Fee}}{\text{1978 PB Total Revenues}} \times \text{1996 PB Total Revenues} \\
 &= \frac{\$1.25 \text{ million}}{\$552.325 \text{ million}} \times \$1.956 \text{ billion} \\
 &= \$4.426 \text{ million}
 \end{aligned}$$

Taking into account  
10 percent increase in  
Public Broadcasting's  
overall music use

$$\begin{aligned}
 &= \$4.426 \text{ million} + \left( \frac{10}{100} \times \$4.426 \text{ million} \right) \\
 &= \$4.869 \text{ million}
 \end{aligned}$$

Using Panel's method  
for adjustment for  
decline in ASCAP's  
music share

$$= \$4.869 \text{ million} \times .75 = \$3.652 \text{ million for ASCAP fee}$$

Using Panel's method  
for adjustment for  
increase in BMI's  
music share

$$= \$3.652 \text{ million} \times .63934 = \$2.335 \text{ million for BMI fee}$$

An adjustment that would take into account both the increase in revenues over the 20 years between 1976 and 1996, (*see supra* at page 29) as well as the 10 percent music usage increase since 1992 would be calculated as follows:

$$\begin{aligned}
 \text{ASCAP Fee} &= \frac{\text{1978 CRT License Fee}}{\text{1976 PB Total Revenues}} \times \text{1996 PB Total Revenues} \\
 &= \frac{\$1.25 \text{ million}}{\$412.2 \text{ million}} \times \$1.956 \text{ billion} \\
 &= \$5.931 \text{ million}
 \end{aligned}$$

Taking into account  
10 percent increase in  
Public Broadcasting's  
overall music use

$$\begin{aligned}
 &= \$5.931 \text{ million} + \left( \frac{10}{100} \times \$5.931 \text{ million} \right) \\
 &= \$6.524 \text{ million}
 \end{aligned}$$

Using Panel's method  
for adjustment for  
decline in ASCAP's music  
share

$$= \$6.524 \text{ million} \times .75 = \$4.893 \text{ million for ASCAP fee}$$

Using Panel's method  
for adjustment for  
increase in BMI's music  
share

$$= \$4.893 \text{ million} \times .63934 = \$3.128 \text{ million for BMI fee}$$

**3. The Panel Made An Arbitrary Assumption That The Public Broadcasters Should Pay The Same Rate of Revenue Now As They Did In 1978, Despite Their Increased Commercialization.**

The Panel assumed that the Public Broadcasters should pay a royalty fee that constitutes the *same rate* of revenue today as they did 20 years ago even though the group of entities constituting "the Public Broadcasters" and their operations are vastly different than they were 20 years ago.<sup>13</sup> The Panel's assumption was arbitrary because the Panel failed to "consider entirely an important aspect of the problem that it was solving" and "it fail[ed] to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Digital Proceeding*, 63 Fed. Reg. at 25,398.

Public broadcasting has changed dramatically in the last 20 years, as the Panel itself recognized. The set of radio and television stations represented in this case as the Public Broadcasters has grown from 452 stations in 1978 to 1,059 stations. *ASCAP PFFCL 115-16*. And these stations, taken together, have become a modern media enterprise. *Report 26*. The Panel itself noted the significance of these changes for the purposes of setting fees in today's world: "That Public Broadcasters have become more 'commercialized' in recent years, and appear more similar to commercial broadcasters, is patent even to a casual observer. *ASCAP PFFCL 35-39, 40-8; BMI PFFCL 29-30, 38-40*. Indeed this convergence may justify a

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13. The evidence was that the radio and television stations referred to in this proceeding as "the Public Broadcasters" are owned and licensed by several hundred different not-for-profit entities located throughout the country, each with its own board of directors, assets, and income. PBS and NPR are owned by their member stations, not the other way around. *W.D. of Day 3; BMI PFCL 13-14*.

*narrowing* of the vast gap between license fee rates paid by Public Broadcasters and those paid by commercial broadcasters." *Report 24*.

While the Panel's Report did not go into detail on the commercialization of the operations of the Public Broadcasters since the 1978 CRT decision, it did cite to sections of BMI and ASCAP's Proposed Findings Of Fact And Conclusions of Law in which this increased commercialization is described:

- the increases in efforts and success by Public Broadcasters to obtain commercial sponsorship by business entities;
- the carriage of programming targeted to commercial sponsors;
- the carriage of programming targeted to donation-giving audiences; and
- the efforts by Public Broadcasters to obtain commercial revenues through entrepreneurial efforts and business alliances.

*See ASCAP PFFCL 35-39, 40-89; BMI PFFCL 29-30, 38-40.*

The Panel's findings of increased commercialization are amply supported by the record evidence. Having made an accurate observation about the increasing commercialization of public broadcasting since 1978 — and having correctly stated that this "may justify a *narrowing* of the vast gap between license fee rates paid by Public Broadcasters and those by commercial broadcasters" (*Report 24*) — the Panel adopted a methodology for determining fees which quite simply failed to take into account this commercialization. Specifically, the Panel assumed that in projecting the 1978 fee into the future the Public Broadcasters should pay the

same rate of revenue now as they did in 1978 even though public broadcasting is even more like commercial broadcasting now than it was then.<sup>14</sup>

The Panel expressly rejected a plausible way of taking into account the increasing commercialization of public broadcasting — namely to focus on the increase in Public Broadcasters' *private* revenues since 1978. *Report 29-30*. Adjusting the 1978 fee to take into account the increase in Public Broadcasters' *private* revenues is a reasonable way to take into account the increased commercialization of public broadcasting in setting a rate based on the 1978 CRT fee.<sup>15</sup> The Panel rejected this method, stating:

"we accept the logic of restricting an analysis to private revenues *if* one does attempt to use commercial rates as a benchmark. Notwithstanding, when performing a *trending* analysis based upon the 1978 *Public Broadcasters'* rates, there is no need to restrict the analysis to private revenues because the methodology does not employ data from the commercial context."

*Report 29.*

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14. As we discuss below, BMI wholeheartedly agrees with the Panel's use of revenues, and percentages of revenues, as a measure of comparison in adjusting benchmark fees. BMI's disagreement on this point is that if 1978 was to be the benchmark year, an adjustment for increased commercialization since that time would be required.
  15. If BMI's preferred benchmark, current fees paid by commercial broadcasters, is used, there is no reason to apply that benchmark to the private revenues of the Public Broadcasters only. But if the 1978 CRT fee were the benchmark, the increasing proportion of Public Broadcasters' revenues coming from private sources would be an appropriate adjustment factor to account for the Public Broadcasters' increased commercialization.

In 1978, the Public Broadcasters generated \$173.4 million in private revenues, compared to \$1.018 billion in 1995.<sup>16</sup> *ASCAP PFFCL 116 n.6*. Set forth below is the Panel's formula (*Report 26-27*) using Public Broadcasting's private revenues (as reported in *ASCAP PFFCL 116 n.6*) rather than total revenues to adjust the 1978 fee forward:

$$\begin{aligned}
 \text{ASCAP Fee} &= \frac{\text{1978 CRT License Fee}}{\text{1978 PB Private Revenues}} \times \text{1995 PB Private Revenues} \\
 &= \frac{\$ 1.25 \text{ million}}{\$173.4 \text{ million}} \times \$1.018 \text{ billion} \\
 &= \$7.341 \text{ million}
 \end{aligned}$$

Using Panel's method  
for adjustment for  
decline in ASCAP's  
music share

$$= \$7.341 \text{ million} \times .75 = \$5.506 \text{ million for ASCAP fee}$$

Using Panel's method  
for adjustment for  
increase in BMI's  
music share

$$= \$5.5 \text{ million} \times .63934 = \$3.520 \text{ million for BMI fee}$$

This fee should also be adjusted by 10 percent to take into account the Public Broadcasters' increase in music use between 1992 and 1996. This adjustment is calculated below.

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16. Private revenue data for 1976 were not available as evidence in the proceeding, so the 1978 revenue data are used.

$$\begin{aligned}
 \text{ASCAP Fee} &= \frac{\text{1978 CRT License Fee}}{\text{1978 PB Private Revenues}} \times \text{1995 PB Private Revenues} \\
 &= \frac{\$1.25 \text{ million}}{\$173.4 \text{ million}} \times \$1.0184 \text{ billion} \\
 &= \$7.341 \text{ million}
 \end{aligned}$$

Taking into account  
10 percent increase in  
public broadcasting's  
overall music use

$$\begin{aligned}
 &= \$7.341 \text{ million} + \left( \frac{10}{100} \times \$7.341 \text{ million} \right) \\
 &= \$8.075 \text{ million}
 \end{aligned}$$

Using Panel's method  
for adjustment for  
decline in ASCAP's  
music share

$$= \$8.075 \text{ million} \times .75 = \$6.06 \text{ million for ASCAP fee}$$

Using Panel's method  
for adjustment for  
increase in BMI's  
music share

$$= \$6.06 \text{ million} \times .63934 = \$3.87 \text{ million for BMI fee}$$

\* \* \*

Even assuming that the 1978 CRT-set fee for ASCAP represented fair market value at that time for those broadcasters, and that this benchmark could be applied today, an adjustment for the increased commercialization of the Public Broadcasters should have been made by factoring in the increased proportion of the Public Broadcasters' revenue derived privately. Such an adjustment by itself would not yield fees that eliminate altogether the

disparity in rates between the Public Broadcasters and commercial broadcasters, but would at least have narrowed the gap.

**C. The Panel Made Arbitrary Assumptions About BMI's And ASCAP's Relative Music Shares In Applying Its Formula.**

Another element of the Panel's formula required an adjustment to take into account changes in the relative music shares of BMI and ASCAP in 1978 compared with their current shares. *Report 31-34*. In order to make this adjustment, the Panel required evidence of the relative music shares as between BMI and ASCAP in 1978 and their relative music shares in 1996. The Panel properly relied upon music use studies presented by BMI and the Public Broadcasters based on reliable and comprehensive data as to BMI's and ASCAP's respective music use shares in 1996. *Report 32*. These studies showed that BMI's music share had grown from about                      to about                      between 1991 and 1996. *BMI PFFCL 9*. No studies or data on relative shares were presented with respect to 1978, however. None of the parties attempted in their cases even to estimate what the BMI/ASCAP relative music use shares were in 1978. The Panel simply made arbitrary assumptions about BMI's and ASCAP's music shares in 1978. *Report 31-34*. Thus the Panel erred in yet another respect in adopting a method which it did not have sufficient data to apply.

**II. THE LIBRARIAN SHOULD ADOPT BMI'S METHODOLOGY TO ARRIVE AT A SUBSIDY-FREE FEE.**

The Panel erred in relying on the 1978 CRT fee in the face of the CRT's statement that that fee was not intended to be binding in the future and the evidence that the 1978 fee contained a subsidy. At the very least, there is doubt as to whether the 1978 fee is a reliable benchmark for setting a fee for the period 1998-2002.

The Public Broadcasters' own expert in this case conceded that if there were no prior agreements to look to for a benchmark, he would "try to find contexts that . . . were from an economic standpoint comparable" and that he "might well look at commercial broadcasting as one potential benchmark." *Tr.* 2773-74. Given that the prior agreements with the Public Broadcasters, as well as the 1978 CRT fee, were designated to be non-precedential as to the future, then the commercial broadcasters' fees are the most obvious benchmark to set the fees in this proceeding. BMI's direct case to the Panel demonstrated the appropriateness of using commercial broadcasters' music license fees as the benchmark of fair market value and how to adjust those fees to fit the Public Broadcasters.

BMI presented un rebutted evidence showing that the Public Broadcasters are substantially similar to commercial broadcasters from the standpoint of acquiring and using music in their programming. BMI presented evidence of the similarities between public and commercial broadcasting in terms of the extent of music usage (if anything, public television uses more music), how music is used as part of the audience's audiovisual (or aural in the case of radio) experience, the value of the music to the intended audience, the musical works used, the types of audiovisual or aural programs in which the music is heard, the process of composing music, how composers are hired, the skill or effort required in their work, the competition between composers, the time commitment involved in composing, and the similarities in the amount of up-front fees received to compose for television, and the electronic media used to disseminate the programming. And as for radio, BMI presented evidence that the music usage involved in both commercial and public broadcasting primarily consists of playing commercial recordings.

To BMI, these similarities are so plain, so close, and so germane to the issue before the Panel, that the Panel's failure to embrace them for the minimal reason it stated is arbitrary as a matter of law for "[it] offers an explanation for its decision that runs counter to the evidence before it." *Digital Proceeding*, 63 Fed. Reg. at 25,398.

We set forth below some of the evidence supporting the common sense observation that the closest proxy for public radio and television broadcasting is commercial radio and television broadcasting.

**A. Public And Commercial Broadcasting Use The Same Media And Compete For Audience.**

Both commercial and public broadcasters provide audiovisual and aural entertainment and information to mass audiences. *W.D. of Owen* 2-3; *Tr. 1441*. The programming of both commercial and public broadcasters is transmitted over the same media (over-the-air, cable, etc.) and it is received on the same equipment in the same homes. *W.D. of Owen* 2-3.

Commercial and public stations compete with each other for audiences. *Tr. 913, 927, 1441, 2234-35*. Public television broadcasts are viewed by 80 percent of the United States television households during the course of each month. *Tr. 2235*. Public radio serves over 92 percent of the United States population. *Tr. 2411; ASCAP Direct Exh. 302 at 6*.

**B. Public And Commercial Broadcasters Use The Same Types of Programming.**

Public and commercial stations also broadcast the same types of programming to the public.

Public television programming is quite similar to commercial programming in terms of the types and nature of programming. *W.D. of Owen 2; W.D. of Willms 8*. Thus, both commercial and public television stations broadcast children's programming, films, popular music and other concerts, 30-minute and one-hour dramas, comedies and dramatic serials, and news and public affairs. *W.D. of Owen 2; Tr. 1441; W.D. of Willms 8; Tr. 1226-27; W.D. of Downey 21*. Often the very same programs appear on public and commercial television. *BMI PFFCL 30*. A series such as *National Geographic Specials* is produced for, and broadcast by, both commercial and public stations. *W.D. of McFadden 4-5; W.D. of Willms 8*. Other examples of shows which have been broadcast on commercial and public television stations include *The Lawrence Welk Show, Disney, The Avengers, Lassie, Ozzie and Harriet, and Star Trek*. *Tr. 593-94*.

Both commercial and public radio provide news, talk, and above all, music. *W.D. of Owen 3*. There is no difference as to what public and commercial radio can program in terms of FCC rules. *Tr. 890*.

Public and commercial broadcasters also compete for the same awards, such as the Emmy awards. *See W.D. of Smith 10, 12-14; BMI Direct Exh. 66*.

**C. The Same Composers' Music is Performed by Public and Commercial Broadcasters.**

The same composers are asked to do the same job with respect to both commercial and public television and radio stations. Often the very same composers are hired to produce music for both public and commercial television. *W.D. of Willms 9; W.D. of Bacon 2; W.D. of McFadden 5*. There was no evidence that different or lesser composers are heard on the Public Broadcasters' stations than on commercial stations. The process of composing music for a

television program is the same regardless of whether the program appears on public or commercial television. *W.D. of Bacon* 4-5. In addition, the technical and artistic quality of music on public television is the same as or surpasses that on commercial television. *W.D. of Bacon* 4-5; *W.D. of McFadden* 3-4. As a result, the programs on public television containing music often require an enormous amount of time and effort to complete the composing work. *W.D. of Bacon* 5.

The inputs used to produce programming for commercial and public radio are also similar. *Tr.* 896. On public radio, like commercial radio, the music broadcast is primarily taken from commercially recorded compact discs and tapes, with some live or pre-recorded concerts. *BMI PFFCL* 39.

In fact, the Panel found that music inputs are bought the same way and for the same prices as in commercial broadcasting. *Report* 23. The Panel found that virtually no evidence was adduced that the "Public Broadcasters pay less than commercial broadcasters for other music-related programming expenses (such as radio disk jockeys, musicians, producers, writers, directors, or equipment operators)." *Id.* The Panel found that "[t]o the contrary, it appears that Public Broadcasters pay rates competitive with commercial broadcasters for other music-related programming costs such as composers' up-front fees. *Tr.* 1636." *Id.*

**D. The Same Music Is Used On Commercial And Public Television And Radio Stations.**

The same music is broadcast by public television and commercial television. *W.D. of Saltzman* 6. Public television programming is comparable to commercial broadcast television in terms of the extent and intensity of its BMI music use (*W.D. of Willms* 8), and actually uses music overall more intensively than commercial broadcast television. *W.D. of*

*Willms 9; W.D. of Owen 8; W.D. of Smith 8; see W.D. of Jaffe 15-21 & Data Underlying Figures 5 and 6 (Corrected).* The music usage studies proving this, offered by both BMI and the Public Broadcasters, were confirmed by a search of matching title codes in the ASCAP 1996 Distribution Survey, which showed that 3,465 of the same ASCAP songs were broadcast at least once by both public television and commercial broadcast television in that year. *W.D. of Saltzman 6-7; ASCAP Direct Exhs. 203, 204.* Like commercial radio stations, BMI music is used by all or virtually all NPR-member radio stations. *W.D. of Smith 14.*

**E. The Public Broadcasters Have Compared Themselves To Commercial Broadcasters.**

The evidence adduced at the proceeding demonstrated, moreover, that in conducting their business affairs, the Public Broadcasters have regularly compared themselves to commercial broadcasters, including when they have dealt with the issue of music licensing fees.

- In the 1992 license negotiations with BMI, Paula A. Jameson, a representative of PBS, specifically compared public television to the commercial networks in terms of their audience sizes. PBS's minutes of a negotiating meeting with BMI of July 9, 1992 — which Ms. Jameson confirmed accurately reflected her statements at the meeting — record Ms. Jameson as stating to BMI: "In preparing for these negotiations we looked at *benchmarks* we considered an appropriate basis for these royalty fees. We looked at the ratio of *network* fees to audience and compared it to our [PBS] audience." *PB Exh. 30X at 4* (emphasis added); *Tr. 3602.*
- Comparing public television to commercial television in terms of relative audience size for purposes of setting the music license fees was also advocated and relied upon by the Public Broadcasters in the 1978 ASCAP CRT proceeding. Professor Baumol, Public Broadcasters' economic expert in that proceeding, testified:

"The magnitude of the service provided by the broadcasting industry is dependent on the size of the audience — the number of persons served. . . .

"What this means is that when a piece of music is broadcast by a commercial network, with its enormous audience a far

greater quantity of product is generated than when a similar piece is transmitted by public broadcasters, with its far smaller audience."<sup>17</sup>

- In the *Satellite Proceeding*, the Public Broadcasters likewise took the position that the fair market value of the programming that PBS distributed which was retransmitted on satellites to home receivers, and which contained BMI and ASCAP copyrighted music, was equal to, if not greater than, the value of the programming broadcast on the three commercial networks — ABC, CBS, and NBC — and PBS, therefore, sought equality of treatment to the commercial broadcasters. Direct testimony of Linda McLaughlin, *Satellite Proceeding*, at 3-4, Table 1 (incorporated in the record by reference by BMI). Notably, in that proceeding, the Public Broadcasters did *not* take the position that, because of differences between public and commercial broadcasting, the programming of the Public Broadcasters (including its musical component) was worth less, on a dollars-and-cents basis, than commercial programming. *Id.*
- The Public Broadcasters have also compared themselves to commercial broadcasters in their own literature. For instance, in its 1997 Annual Report, PBS touted its success in relation to commercial broadcasters, stating:

"In a year when the commercial broadcast networks continued to experience erosion of their audience share to niche programmers on cable, PBS's prime-time viewership held firm and steady; . . .

"In a ruthlessly competitive media marketplace, where commercial programmers struggle to define a distinctive brand identity . . . we are finding it possible to succeed by reaching out to every audience segment and extending our creativity into new services and new media."<sup>18</sup>
- PBS has also compared its programs with the commercial networks, saying it has "garnered more Peabody Awards and children's Daytime Emmys than NBC, CBS, ABC and Fox combined." *ASCAP Exh. 14X at 4-5.*

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17. *1978 Noncommercial Educational Broadcasting Rate Adjustment Proceeding*, Testimony of William Baumol, V-51. PBS's general counsel at the time, Eric Smith, stated the same. *1978 Noncommercial Educational Broadcasting Rate Adjustment Proceeding*, Testimony of Eric Smith VI-8.

18. *ASCAP Exh. 14X at 4.*

**F. The Panel Erred In Failing To Adopt A Fee Based On A Comparison To Commercial Broadcasters.**

BMI presented un rebutted evidence showing that despite the similarities between Public Broadcasters and commercial broadcasters from the standpoint of music use, there is a vast disparity in the back-end performance royalties a composer has received, under the § 118 compulsory license, for music performed on public television as opposed to music performed on commercial television.

The un rebutted testimony of one BMI witness, composer Michael Bacon, as set forth above in the summary of argument, demonstrated a disparity of approximately 60 times for royalties for the performance of identical work through the same medium to the same viewers. *See W.D. of Bacon 6.* Given that the evidence was clear that Public Broadcasters generally paid the same rates as commercial broadcasters for other programming inputs, the only explanation for this vast disparity was that Mr. Bacon — and all other BMI composers — have been subsidizing the Public Broadcasters. Therefore, in order to prevent its composers from having to shoulder the burden of subsidizing public broadcasting, BMI asserted that the Public Broadcasters should pay rates comparable to those paid by commercial broadcasters.

The Panel largely agreed with, but failed to act on, BMI's evidence that commercial broadcasting and public broadcasting are substantially similar from the standpoint of music use. Thus, the Panel acknowledged the increased commercialization of the Public Broadcasters — "that Public Broadcasters have become more 'commercialized' in recent years, and appear more similar to commercial broadcasters, is patent to even a casual observer. *See generally ASCAP PFFCL 35-39, 49-80; BMI PFFCL 29-30, 38-40.*" *Report 24.* And the Panel even accepted that this increased commercialization warranted an increase in fees, noting that

this "convergence may justify a *narrowing* of the vast gap between license fee rates paid by Public Broadcasters and those paid by commercial broadcasters." *Report 24*. Further, the Panel also expressed its concern about the size of the disparity between the rates under the prior agreements with the Public Broadcasters and those paid by the commercial broadcasters. "It is the *magnitude* of the disparity that causes the Panel to further question whether the rates negotiated under the prior agreements truly constituted fair market rates." *Id. at 23*. Yet the Panel failed to reach the conclusion these facts ineluctably point to: the use of the rates paid in the marketplace by other broadcasters for the same rights as the benchmark for this proceeding.

At least one prior CARP decision has stated that in determining the fair market value of a compulsory license that it is proper for the Panel to look to market evidence. In the *Satellite Proceeding*, the Panel was charged with conducting a proceeding to determine reasonable royalty fees to be paid by satellite carriers for the compulsory license established in section 119 of the Copyright Act, for the retransmission of superstation and network television broadcast signals. 62 Fed. Reg. at 55,742. The Panel concluded based on its review of the statute and its legislative history that fair market value meant the rate "which most closely approximates the rate that would be negotiated in a free market between a willing buyer and a willing seller." *Id. at 55,746* (quoting Panel Report at 17).

The Librarian confirmed that this was the appropriate benchmark. The Librarian stated:

"Having determined that 'fair market value' meant the price that would be paid by a willing buyer and seller in a free marketplace, it was not illogical for the Panel to give careful consideration to evidence of markets that most closely resembled the licensing of signals under section 119 . . . . The Panel weighed the evidence and accepted the copyright owners' approach using cable network fees because it was 'the *most similar* free market [it] could observe.'"

*Id.* at 55,748-49 (emphasis in original) (quoting Panel Report at 30).

The Panel in this proceeding offered no rational basis, however, justifying a difference in the price between what the Public Broadcasters should pay and what commercial broadcasters pay. The only distinction the Panel drew between public and commercial broadcasting is that public broadcasting derives revenue from different sources than does commercial broadcasting. *Report 24*. The Panel found that "[c]ommercial broadcasters generate their revenues through the sale of advertising while Public Broadcasters derive their income through a variety of sources including corporate underwriting, Congressional appropriations, and viewer contributions. *W.R. of Jaffe 15-17; PB Direct Exh. 4; Tr. 1972-73, 2271-73.*" *Report 24*. For this reason, the Panel concluded that commercial broadcasters are able to pass increased costs through to the advertiser and that no comparable mechanism exists for Public Broadcasters. *Report 24*. And this was the Panel's sole stated reason for rejecting the commercial broadcasting benchmark offered by BMI and ASCAP.

There is no record evidence supporting the conclusion that commercial broadcasters can pass along costs of music licenses at will. Even Dr. Jaffe, the Public Broadcasters' economic expert, conceded that at best this was only a "possibility." *W.D. of Jaffe 10 n.5*. To the contrary, there is every reason to believe that commercial broadcasters are already charging advertisers as much as the market will bear and that they are in no better position to attempt to charge any more than the Public Broadcasters would be to solicit more corporate underwriting funds, individual contributions, or government funds. In any event, different sources of income do not explain why public broadcasters should pay less for the same programming inputs given the fact that all monies — no matter what their source — are available to pay for such inputs. This is especially so given that there is no evidence that Public

Broadcasters as a general rule pay less than commercial broadcasters for other programming inputs.

As BMI argued to the Panel, just as non-profit institutions generally have to purchase goods and services in the marketplace at the same prices as everyone else, the source of funding for the Public Broadcasters is logically irrelevant to how much they should pay for copyrighted music. *BMI Reply PFFCL 4*. Thus, the Panel's reasoning to distinguish commercial broadcasters "fail[ed] to examine the data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Digital Proceeding*, 63 Fed. Reg. at 25,398. Hence, the Panel's reasoning was arbitrary.

**G. The Appropriate Subsidy-Free Fee Is That Proposed By BMI.**

There was no evidence in the proceeding that the Public Broadcasters, as a general rule, pay less than commercial broadcasters for programming inputs. Given that a task of the Panel was to ensure that BMI's composers do not subsidize Public Broadcasters, there is no reason why BMI composers would be treated any differently in a free market from the providers of other programming inputs. It is important to be clear, BMI does not take the position that the Public Broadcasters should pay the same fee as commercial broadcasters. Rather, BMI recognizes that public broadcasting stations have smaller revenues, smaller audiences, and smaller programming expenditures than commercial stations in the aggregate. BMI, therefore, asserts that it is appropriate for Public Broadcasters to pay the same rate as commercial broadcasters only after making adjustments for differences in size. Thus, BMI's proposed method for determining the fee in this proceeding seeks to adjust the commercial rates to take into account the differences between the Public Broadcasters and the commercial broadcasters based upon various parameters. After taking these differences into account, the evidence

presented by BMI to the Panel demonstrated that in order to eliminate the vast disparity between the fees paid by the commercial broadcasters and those paid by the Public Broadcasters, it would be necessary to set a fee for public television of somewhere between \$4 million and \$6 million and for public radio of between \$1 million and \$2 million. BMI proposed fees amounting to \$6.895 million for public television and public radio combined, which was approximately the middle of these ranges.<sup>19</sup>

BMI's proposed methodology has four steps: (1) identifying the fees negotiated between BMI and the commercial television and radio broadcasters; (2) analyzing public television by reference to four adjustment factors — relative music usage, programming expenditures, audience size, and revenues; (3) performing the same adjustment analysis for radio; and (4) calculating the fees for public television and public radio on the basis of the benchmark as adjusted by the four adjustment factors. None of the evidence presented by BMI to implement this methodology was seriously contested at the hearings.

Applying BMI's methodology, it is clear that public television is between 4 percent and 7 percent the size of commercial broadcast television as measured by the size of programming expenditures, revenues, and audience. Because public television and commercial broadcast television use about the same amount of BMI music per broadcast hour, a fair market

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19. Given that they are separate media, with different music usage patterns, and that their representatives PBS and NPR are separate entities, BMI believes the better, more transparent approach would be to set separate fees for public radio and public television, and BMI unsuccessfully advocated this to the Panel. While heretofore the Corporation for Public Broadcasting has paid BMI for both public radio and public television licenses, there is no legal requirement that it do so in the future. *BMI PFFCL* 85-86, 87-88.

value fee for public television is between 4 percent and 7 percent of the in fees paid by the commercial television broadcasters — between \$4 million and \$7 million. BMI sought the mid-point of \$5.5 million in this proceeding.

Applying the same methodology, it is clear that public radio is between 3 percent and 5 percent the size of commercial radio as measured by revenue and audience size. Because public radio stations, on average, use at least one-third as much copyrighted music as commercial radio stations per broadcast hour using the most conservative assumptions, a fair market value fee for public radio is at least 1 percent to 2 percent of the in fees paid by the commercial radio stations. BMI sought a fee of \$1.395 million for public radio in this proceeding.

BMI's methodology is set forth below:

**1. The Fees Negotiated between BMI and the Commercial Broadcast Industry**

BMI presented un rebutted evidence that it expects to receive in licensing fees from the three networks ABC, CBS, and NBC (approximately and local television stations (approximately *W.D. of Willms 16*. BMI also presented evidence that it received approximately in 1996 in license fees from about 10,000 commercial radio stations. *W.D. of Willms 24*.

**2. The Four Factors of Music Use, Programming Expenditures, Revenues, and Audience for Television**

**a. Music Use**

It would be expected that if BMI or ASCAP music is used more (or less) intensely on public television than on commercial television, public television could be expected to have a

higher (or lower) fee, other things being equal. *W.D. of Owen 4-5*. Based on the presentation of music use data by BMI and the Public Broadcasters, BMI concluded that BMI music usage per broadcast hour was quite comparable on public and commercial television. *BMI PFFCL 49-52*.

**b. Programming Expenditures**

BMI presented undisputed evidence in the proceeding that public television programming expenditures were 6.7 percent of the level of commercial television programming expenditures. *W.D. of Owen 11*.

BMI focused on programming expenditures as one basis on which to compare public and commercial television because it was undisputed in the proceeding that public and commercial television pay market prices for similar types of non-music programming inputs. *W.D. of Owen 5*. The Public Broadcasters' expert agreed that programming expenditures was a relevant method of comparison. *Tr. 2758, 2760*. BMI demonstrated that if public television and commercial broadcast television use music with similar intensity, the relationship between total programming costs and music fees in commercial broadcast television should be similar to the relationship between total programming costs and market-based music fees in public television. *W.D. of Owen 5*. Accordingly, under BMI's methodology, programming expenditures of public television that are lower (or higher) than commercial broadcast television would yield music license fees for public television that are lower (or higher) than music license fees for commercial television, other things being equal. *W.D. of Owen 5*.

The evidence showed that total programming expenditures by public television at all levels in fiscal year 1995 were about \$674 million. *W.D. of Owen 9* (citing Direct Testimony of John Wilson before the Copyright Arbitration Royalty Panel, Docket No. 96-3 CARP SRA, at 41, incorporated by reference in the Panel record by BMI); *PB Direct Exh. 6*.

The evidence also showed that an average of the programming expenditure levels for commercial broadcast television in 1994 and 1995 yields \$10.102 billion per year. *W.D. of Owen 10.*

**c. Revenues**

BMI presented undisputed evidence that public television revenues were approximately 4.6 to 4.8 percent of commercial broadcast television revenues in 1994 and 1995. *W.D. of Owen 12.*

BMI's methodology focused on revenues because these are a rough measure of a buyer's ability to pay for a good or service (*W.D. of Owen 5; Tr. 2759*) and are also a rough proxy for programming expenditures, which are related to the level of music fees. *W.D. of Owen 5; Tr. 2760-2763.* The Public Broadcasters' expert confirmed this. *Tr. 2942-2943.* Accordingly, under BMI's methodology, if public television has lower (or higher) revenues than commercial broadcast television, the public television fee would be expected to be lower (or higher), other things being equal. *W.D. of Owen 5.*

The total revenues of public television were \$1.460 billion in fiscal year 1995, (*BMI Direct Exh. 43; PB Direct Exh. 4*) and \$1.383 billion in fiscal year 1994. *BMI Direct Exh. 44; PB Direct Exh. 4.*

BMI took an average of commercial broadcast television revenues in 1993-1994 and 1994-1995. *W.D. of Owen 11-12.* The average ranged from \$29.093 billion to \$31.927 billion per year. *W.D. of Owen 11.*

**d. Audience Size**

BMI presented undisputed evidence demonstrating that public television audience in the past three years has been approximately 4.4 to 5.5 percent as large as the audience for commercial broadcast television. *W.D. of Owen 12*.

BMI focused on audience size as a basis to compare public and commercial television because the purpose of programming in all broadcast television is to entertain and inform an audience in the very same manner, either as an end in itself or as a means to sell audience to advertisers or corporate underwriters. *W.D. of Owen 6*. Therefore, under BMI's methodology, if public television has a smaller (or larger) audience than commercial broadcast television, one would expect public television to have a smaller (or larger) fee, other things being equal. *W.D. of Owen 6; Tr. 2766-2767*.

**e. Public Television Is Approximately 4 to 7 Percent As Large As Commercial Broadcast Television**

Thus, using a comparison on the basis of revenue, programming expenditures, and audience size, each of which yields a similar result, the undisputed evidence was that public television is about 4 to 7 percent of the size of commercial broadcast television. *W.D. of Owen 13*.

Therefore, under BMI's method, a fair market value fee for public television would be approximately between 4 percent to 7 percent of the fee paid by the commercial television broadcasters for the same music license at issue in this proceeding, or between \$4 million and \$7 million.

### **3. BMI's Analysis Of Public Radio**

#### **a. Revenues**

The evidence in the proceeding showed that public radio revenues were 4.1 to 4.2 percent of commercial radio revenues. *W.D. of Owen 15*.

Total revenues for public radio at all levels in fiscal year 1994 were \$411 million (*BMI Direct Exh. 44*) and in fiscal year 1995 were approximately \$457 million. *See BMI Direct Exh. 50; W.D. of Owen 15 n.39; PB Direct Exh. 4*.

BMI calculated an average of commercial radio revenues in 1993-1994 and 1994-1995, respectively, and arrived at a figure of just over \$10 billion. *W.D. of Owen 15*.

#### **b. Audience Size**

The evidence in the proceeding showed that public radio listening is conservatively estimated to be 3.4 percent of commercial radio listening hours. *W.D. of Owen 16*.

#### **c. Public Radio Is Approximately 3 To 4 Percent As Large As Commercial Radio**

The revenue and audience size of public radio are approximately 3 to 4 percent of commercial radio.<sup>20</sup> *W.D. of Owen 16*. Using a lower-end estimate that public radio's use of copyrighted music is only one-third the level of commercial radio based on differences in programming formats, a market transaction setting licensing fees BMI receives from public radio

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20. No data were available to compare programming expenditures on public and for-profit radio.

was estimated to be in the range of one to two percent of the fees paid by commercial radio.

*W.D. of Owen 16.*

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The adoption of the fees proposed by BMI would eliminate the unwarranted subsidy (after adjustments for differences in size) that exists in the fees that the Public Broadcasters paid in the past.

As noted, although the Panel expressed a concern about the size of the disparity between the fees paid by the Public Broadcasters and those paid by the commercial broadcasters, and although the Panel went some way towards diminishing this disparity, the Panel nonetheless went on to set a fee which continued to reflect a vast disparity, and, therefore, would continue to require BMI composers and their publishers to subsidize the Public Broadcasters. The Panel's rate needs to be increased substantially to eliminate the subsidy entirely and fulfill Congress's mandate.

**III. IF FULL COMMERCIAL BROADCASTING RATES ARE NOT USED AS THE RELEVANT BENCHMARK, THEN COMMERCIAL RATES AS ADJUSTED DOWNWARD BY USE OF PRIVATE REVENUES SHOULD BE USED AS THE BENCHMARK.**

The Panel stated in its Report that "if one does attempt to use commercial rates as a benchmark," the Panel "accept[s] the logic of restricting an analysis to private revenues" "for the reasons cited by ASCAP." *Report 29*. BMI believes that full commercial broadcasting rates should be used as the benchmark in this proceeding as set forth in the methodology in BMI's Proposed Findings. *See BMI PFFCL 41-58*. However, if the Librarian were to determine that less than full commercial rates should be the benchmark, one possible method for doing so would be to restrict the analysis to only the *private* revenues of the Public Broadcasters and to exclude

all their tax-based revenues as ASCAP proposed. While BMI believes this is, in fact, an erroneous way to proceed, such an approach would be preferable to using the 1978 CRT determination as a benchmark, as the Panel did, since at least there was record proof of these amounts and BMI has had an opportunity to be heard on this issue.

BMI has requested an annual aggregate fee of \$5,500,000 for public television and an aggregate annual fee of \$1,395,000 for public radio for a total annual aggregate fee of \$6,895,000 based on a comparison of commercial broadcasting revenues to all public broadcasting revenues in 1995. *BMI PFFCL 1-2, 41-57*. Since in that year public broadcasting's private revenues were approximately 47 percent lower than all public broadcasting revenues (*compare W.D. of Boyle 8 with BMI PFFCL 53, 55*), reducing the \$6,895,000 by approximately 47 percent would yield a total annual aggregate fee to BMI of approximately \$3.65 million.

**IV. IF THE LIBRARIAN DOES NOT CHOOSE TO ADOPT COMMERCIAL PARITY IN THIS PROCEEDING, HE SHOULD MAKE CLEAR THAT BMI CAN SEEK COMMERCIAL PARITY IN A FUTURE PROCEEDING SO AS TO ELIMINATE THE DISPARITY BETWEEN THE RATES PAID BY PUBLIC BROADCASTERS AND COMMERCIAL BROADCASTERS.**

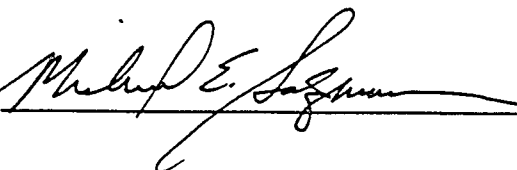
If the Librarian chooses not to adopt a rate in this proceeding that would eliminate entirely the disparity between the fees paid by Public Broadcasters and commercial broadcasters, whether out of concern for the Public Broadcasters' finances or the rate of increase from prior fees required to eliminate the subsidy which has existed over a long period, BMI submits that the Librarian should, at a minimum, make clear that BMI is free to argue in a future CARP proceeding that Section 118 license fees should be set on the basis of a comparison to commercial broadcasting, under the facts and circumstances as they may develop in the future.

### Conclusion

For the foregoing reasons, BMI respectfully requests that the Librarian set aside the Panel's Report dated July 22, 1998 or substantially modify it to be consistent with the law and the evidence.

Dated: August 5, 1998

Respectfully submitted,

By: 

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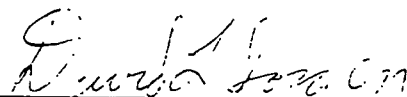
CERTIFICATE OF SERVICE

I, David L. Sorgen, an attorney, hereby certify that I caused a copy of the foregoing Petition of Broadcast Music, Inc. to set aside or, in the alternative, modify the Panel Report dated July 22, 1998 in the Matter of Adjustment of Rates for Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6, in the Library of Congress, to be delivered by messenger on this 5th day of August, 1998 to each of the parties listed on the attached service list.

Deponent is over the age of 18 and not a party to this proceeding.

I further certify under penalty of perjury that the foregoing is true and correct.

Executed on August 5, 1998.



---

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# **APPENDIX A**

**PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW OF BROADCAST MUSIC, INC.**

REDACTED

CONTAINS CONFIDENTIAL  
PROTECTED MATERIALS SUBJECT  
TO THE PROTECTIVE ORDER IN  
DOCKET NO. 96-6 CARP NCBRA  
CONTAINS "ATTORNEYS' EYES  
ONLY" MATERIALS

Before the  
COPYRIGHT ARBITRATION ROYALTY PANEL  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.

Lewis Hall Griffith, Chairperson  
Edward Dreyfus, Arbitrator  
Jeffrey S. Gulin, Arbitrator

In the Matter of

ADJUSTMENT OF RATES FOR  
NONCOMMERCIAL EDUCATIONAL  
BROADCASTING COMPULSORY LICENSE

)  
) Docket No. 96-6 CARP NCBRA  
)  
)  
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)

PROPOSED FINDINGS OF FACT  
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Before the  
COPYRIGHT ARBITRATION ROYALTY PANEL  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.

Lewis Hall Griffith, Chairperson  
Edward Dreyfus, Arbitrator  
Jeffrey S. Gulin, Arbitrator

In the Matter of

ADJUSTMENT OF RATES FOR  
NONCOMMERCIAL EDUCATIONAL  
BROADCASTING COMPULSORY LICENSE

)  
) Docket No. 96-6 CARP NCBRA  
)  
)  
)  
)

**PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW OF BROADCAST MUSIC, INC.**

1. Broadcast Music, Inc. ("BMI"), in accordance with the Order of the Copyright Arbitration Royalty Panel (the "Panel") dated April 6, 1998 and 37 C.F.R. § 251.52, hereby submits its proposed findings of fact and conclusions of law in this proceeding.

**BMI'S PROPOSAL OF REASONABLE RATES AND TERMS**

2. The evidence in this proceeding supports the following rate for noncommercial broadcasting to pay BMI under 17 U.S.C. § 118:

(a) an annual aggregate fee of \$5,500,000 for each year from 1998 through 2002 from the 356 public television stations represented by Public Broadcasting Service ("PBS") in this proceeding ("PBS stations") (but not less than (i) 42.5 percent of all fees awarded (or voluntarily agreed to be paid) to the American Society of Composers, Authors and Publishers ("ASCAP") and BMI in the aggregate by the PBS stations or, expressed another way, (ii) 74

percent of the fees awarded (or voluntarily agreed to be paid) to ASCAP by the PBS stations),  
and

(b) an annual aggregate license fee of \$1,395,000 for each year from 1998 through 2002 from the 691 public radio stations represented in this proceeding by National Public Radio ("NPR") ("NPR stations") (but not less than (i) 42.5 percent of all fees awarded or voluntarily agreed to be paid to ASCAP and BMI in the aggregate by the NPR stations or, expressed another way, (ii) 74 percent of the fees awarded (or voluntarily agreed to be paid) to ASCAP by the NPR stations). These are revised proposals for the PBS and NPR stations pursuant to 37 C.F.R. § 251.43(d).<sup>1</sup>

3. The proposed BMI license fees of \$6.895 million per year will cover all of the BMI music used by the public television and radio stations qualified for funding by the Corporation for Public Broadcasting ("CPB") of the kind that have been heretofore covered by the blanket license agreement between BMI and PBS and NPR. This includes the BMI music used in the "network" programming made available to such stations throughout the United States by PBS and NPR as well as music in the stations' own local and syndicated programming. The license does not include transmissions over the Internet or transmissions by a public station that broadcasts commercially for any part of the day.

---

1. Throughout this document, references to written direct testimony will be cited as "D.T." preceded by the last name of the witness; references to written rebuttal testimony will be cited as "R.T." preceded by the last name of the witness; testimony in the transcript record will be designated by Transcript ("Tr.") followed by the page number and the last name of the testifying witness in parentheses; and exhibits will be referred to as "Exh." followed by the exhibit number and preceded by either the sponsoring witness' name or the party which introduced the exhibit at the hearing.

4. In addition, BMI proposes that the Public Broadcasters be required to provide information about their use of BMI music during the license period as follows:

(i) PBS and NPR shall maintain and quarterly furnish to BMI copies of their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs during the preceding quarter (including the title, composer and author, type of use, and manner of performance thereof, in each case to the extent such information is reasonably obtainable by PBS and NPR in connection therewith).

(ii) PBS stations and NPR stations shall furnish to BMI, upon the request of BMI, a music-use report listing all musical compositions broadcast from or through each station, on all PBS, NPR and other programs carried by such station, showing the title, composer and author of each composition. PBS stations and NPR stations will not be obligated to furnish such reports to BMI for a period or periods which in the aggregate exceed four weeks (per station) in any one calendar year.

5. The full text of BMI's proposal is set forth in the form of BMI's proposed regulations attached as Appendix A.

## **PART I: PROPOSED FINDINGS OF FACT OF BROADCAST MUSIC, INC.**

### **INTRODUCTION**

6. The task for the Panel in this proceeding is to set reasonable rates and terms for the Public Broadcasters' use of the music in the BMI and ASCAP repertoires for the five-year period 1998-2002. All the parties to this proceeding agree that, in setting a reasonable fee, the Panel should attempt to determine the fair market value of a blanket license to use the music in the BMI and ASCAP repertoires, or, to put the point another way, this Panel should set a subsidy-free fee.

7. BMI's proposed methodology for the Panel to use to determine a fair market value, subsidy-free fee is to base the fee on a comparison between public radio and television and commercial broadcasting. BMI does not propose that the Public Broadcasters be required to pay the same fee as commercial broadcasters. In proposing a methodology that rests on a comparison with commercial fees, moreover, BMI does not assert that public broadcasting and commercial broadcasting are alike in every respect. BMI acknowledges that public broadcasting and commercial broadcasting have their differences. Nonetheless, the evidence shows that public broadcasting and commercial broadcasting are substantially the same in the respects that are relevant to the issue before this Panel – namely, with respect to the value of music used in their programming.

8. While differing from BMI's methodology in some specifics, ASCAP also proposes a methodology to set a fee in this proceeding that rests on a comparison to the music license fees paid by commercial broadcasters. (Boyle D.T. 4.)

9. The Public Broadcasters, however, propose a different methodology – they rely exclusively on the prior agreements between the Public Broadcasters and BMI or ASCAP. But it is undisputed that the fact that the parties entered into prior agreements does not mean that the fees agreed to therein are, by definition, reflective of the fair market value of a license to use BMI or ASCAP music for the period 1998-2002.

10. BMI and ASCAP have offered ample evidence in this proceeding to demonstrate that there were numerous reasons why each of them independently agreed to fees in the past that simply did not reflect the fair market value of a blanket license to use their music. (See ¶¶ 175-194 below.) Indeed, this explains the presence in the prior agreements of, in the case of BMI, a very strict non-disclosure provision, and, in the case of ASCAP, a no-precedent clause. In these

circumstances, it is clear the prior agreements do not form a reliable benchmark to set the fees in this proceeding.

11. The Public Broadcasters' own expert conceded that if there were no prior agreement to look to, he would "try to find contexts that . . . were from an economic standpoint comparable" and that he "might well look at commercial broadcasting as one potential benchmark." (Tr. 2773-74 (Jaffe).) If, as the Public Broadcasters concede, commercial broadcasters' fees might be a potential benchmark in the absence of prior agreements, it follows that commercial broadcasters' fees must at a minimum be considered where there is any doubt as to whether those prior agreements between the parties are reliable benchmarks for the future.

12. When the Public Broadcasters' fees set forth in the agreement for BMI for the period 1993-1997 are compared to fees paid by commercial broadcasters for the identical blanket license at issue in this proceeding per year versus about per year) – a disparity of almost three hundred times – it is clear that reliance on the prior agreements is simply untenable. However much the Public Broadcasters attempt to explain away this huge disparity, they have introduced no evidence at all in support of the proposition that they pay 1/300th as much as commercial broadcasters for their programming acquisition costs or even for other individual programming inputs, such as payments to screenwriters, directors, or actors. It is worth noting in this connection that the Public Broadcasters' expert economist conceded that he was not aware of any discounts given by other purveyors of goods and services to the Public Broadcasters and, in fact, that he had not done any analysis of whether others gave discounts to the Public Broadcasters as compared to commercial broadcasters. (Tr. 2815-2816 (Jaffe).) Indeed, when it comes to up-front fees to composers, the undisputed evidence is that public broadcasters pay no less than the commercial broadcasters. (Tr. 1636 (Bacon).)

13. In seeking to determine a subsidy-free fee, BMI proposes starting with the commercial broadcast license fees and adjusting them for relative music usage and to reflect the fact that public broadcasting is much smaller than commercial broadcasting by examining three relevant factors: revenues, programming expenditures and audience size. These indices are very consistent. With respect to television, public broadcasting is between 4 percent to 7 percent the size of commercial broadcasting; with respect to radio, public broadcasting is between 1 percent to 2 percent the size of commercial broadcasting. Application of these factors yields a fee range for public television of between \$4 million and \$7 million and between \$1 million and \$2 million for public radio. The mid-point of the range establishes a proposed fee of \$5.5 million for public television. The fee proposal of \$1.395 million is also well within the range for public radio. Given the fact that the fee-setting process in this case is not formulaic, the Panel has the discretion to set the fees at any level within the proposed fee range.

14. The evidence was clear that in prior negotiations between the Public Broadcasters and BMI or ASCAP, fees for radio were virtually ignored. As one of the Public Broadcasters' witnesses stated, "in my recollection of all these negotiations, I have never seen anybody – BMI, ASCAP, or Public Broadcasting – come forward with any data with respect to radio." (Tr. 2660 (Jameson).) Indeed, for the Public Broadcasters, the allocation of separate fees between public television and public radio was simply "anathema." (Tr. 2661, 2663 (Jameson).) Similarly, the Public Broadcasters have consistently taken the position in negotiations that the 356 individual television stations and 691 radio stations would not voluntarily pay a single penny of their own for music license fees, even though they are all separately owned and operated by hundreds of distinct entities around the country – steadfastly maintaining that they would voluntarily pay music fees only out of one limited line-item in the budget of the CPB. (Berenson R.T. 2.)

15. While BMI and ASCAP, for various reasons, agreed in years past to license fees that did not reflect the fair market value to the Public Broadcasters of the right to use music in their repertoires, they have now each decided that the extent of the subsidy had grown too large and that, simply, "[i]t's time not to do it any more." (Tr. 3458 (Berenson).)

16. The last rate proceeding to determine music licensing fees for public broadcasting was in 1978 – twenty years ago. Two members of the Copyright Royalty Tribunal ("CRT") at that time believed that the CRT should rely on commercial license fees as the benchmark, stating that: "In our opinion the most logical bench mark to establish a rate for Public Broadcasting was to compare it to the established industry practice of commercial broadcasting . . . Those most affected by the adoption of this Section are the artists of America." (Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting, 43 Fed. Reg. 25068, 25070 (June 8, 1978) (ASCAP Exh. 8).) At the time of the 1978 proceeding, commercial license fees were uncertain, however, and the Public Broadcasters argued that the commercial fees could not be used as a proxy precisely because they were uncertain. (Berenson R.T. 9.) The majority of the CRT rejected the use of any particular benchmark *at that time*, reasoning that:

"The CRT finds that there is no one formula that provides the ideal solution, especially when the determination must be made within the framework of a statutory compulsory license. Any formula that was chosen would be subject to certain limitations in the absence of appropriate qualifications."

(43 Fed. Reg. at 25069 (ASCAP Exh. 8).) The CRT majority noted that its decision not to pick a benchmark at that time was not intended as a precedent for future proceedings.

"The CRT has adopted this schedule on the basis of the record made in this proceeding. When this matter again comes before the CRT, the CRT will have the benefit of several years experience with this schedule. The CRT does not intend that the adoption of

this schedule should preclude active consideration of alternative approaches in a future proceeding."

(Id.)

17. This is the first time in twenty years that commercial broadcasters' music licensing fees – at least in the case of television – can be used as a comparison in a section 118 rate proceeding, because at the time of the 1978 proceeding and the 1982, 1987 and 1992 negotiations the fees to be paid by commercial broadcasters to BMI and ASCAP were uncertain and were the subject of litigation seeking radical changes from the interim rates then being paid.

18. The record in this proceeding reflects that there has been an increasing convergence between public and commercial broadcasting in the United States in the twenty years since the last CRT proceeding. In the last twenty years, the revenues of public broadcasting have increasingly come from private as opposed to government sources, the Public Broadcasters have become increasingly entrepreneurial, there has been a relaxation of the rules intended to distinguish underwriting credits from commercials, and the Public Broadcasters have repeatedly compared themselves to commercial broadcasters in compulsory licensing proceedings and in the marketplace. (See ¶¶ 162-174, below.)

19. While there are certainly differences between public and commercial broadcasting, those differences do not concern the extent of music usage (if anything, public television uses more music), how music is used as part of the audience's audiovisual (or audio in the case of radio) experience, the value of the music to the intended audience, the musical works used, the types of audiovisual or audio programs in which the music is heard, how composers are hired, the skill or effort required in their work, the competition between composers, or other characteristics relevant to the price of music. In short, commercial broadcasting is similar

enough to the Public Broadcasters so that their music license fees can serve as an appropriate benchmark for the relevant purpose here.

20. On any theory, BMI deserves a large license fee increase from the most recent combined license fee year. Commercial music license rates have been set and can now be used as the benchmark for this proceeding. The disparity between commercial and prior Public Broadcaster rates is so great that the conclusion is inescapable that the Public Broadcasters have been subsidized by the songwriters and music publishers. Moreover, BMI's music share has doubled over the past five years from approximately And while in principle fees can be set by the CARP every five years, in reality there has been no good opportunity for a CARP (or the predecessor CRT) to set fees over the past twenty years. This is the first body to have a look at the issues presented here in many years, and its decision, given the expense of these proceedings, could well determine the pattern of fees for many years to come.

**REDACTED**

## I. BACKGROUND OF THE PROCEEDING

### A. The Parties

#### 1. The Music Performing Rights Organizations

##### a. BMI

21. BMI is a music performing rights licensing organization, organized as a corporation, representing over 180,000 affiliated songwriters, composers and music publishers ("BMI's affiliates"). (Smith D.T. 2; Willms D.T. 2.) BMI operates on a not-for-profit basis and was founded by a group of radio broadcasters in 1939 to serve as a competitor to ASCAP – still BMI's principal competitor for the licensing of performing music rights in the United States. (Smith D.T. 2; Willms D.T. 2.) BMI's repertoire consists of approximately 3 million musical

works which extend to every field and genre of music, including movie scores, television theme and background music, band and orchestral music, folk music, classical music, popular music in all its forms, musical theater, and jazz. (Smith D.T. 3; Willms D.T. 2.) In every category, BMI's affiliates include many or most of the leading composers and songwriters. (Smith D.T. 3.) By many criteria, BMI has the most successful and most popular repertoire of the three American performing rights organizations. (Smith D.T. 3.)

22. For example, BMI represents 76 percent of the songwriters inducted into the Rock & Roll Hall of Fame, 83 percent of the songwriters inducted into the Country Music Hall of Fame, and 90 percent of the recipients of the Pioneer Awards for Rhythm and Blues. (Smith D.T. 6.) BMI songwriters inducted into these halls of fame or receiving these awards include Paul Simon, Art Garfunkel, Paul McCartney (as a member of the Beatles), John Lennon, Elvis Presley, Pete Seeger, Ray Charles, James Brown and Bo Diddley. (Smith D.T. 6; see BMI Exhs. 8, 9, 10.)

23. BMI also represents some of the most popular jazz composers, including, to name three, Charlie Parker, Charles Mingus and Thelonious Monk. (Smith D.T. 6.) BMI represents approximately 67 percent of the Down Beat Jazz Poll winners for 1996, 75 percent for 1995, 71 percent for 1994, 69 percent for 1993 and 59 percent in 1992 (after accounting for ties with ASCAP and SESAC composers). (Smith D.T. 6; BMI Exh. 12.)

24. In addition, BMI represents many famous American classical music composers, including Charles Ives, Elliott Carter, Roger Sessions, Walter Piston, and William Schuman (Smith D.T. 6-7.) BMI also licenses the works of such commonly heard foreign orchestral composers such as Heitor Villa-Lobos, Maurice Ravel, Richard Strauss, and Ottorino Respighi. (Smith D.T. 7.)

25. BMI songwriters and composers won approximately 60 percent of the Grammys awarded in 1997, 58 percent in 1996 and 48 percent in 1995 (after accounting for split shares with ASCAP and SESAC writers). (Smith D.T. 7.) BMI songwriters and composers have also won numerous Emmy Awards and Academy Awards. (Smith D.T. 7; BMI Exh. 16.)

**b. ASCAP**

26. ASCAP is a non-profit, unincorporated membership association with more than 67,000 writer and publisher members. (Rodgers D.T. 3, 8.) ASCAP has an extensive repertoire of copyrighted musical compositions. (Rodgers D.T. 3.) ASCAP has as members many leading songwriters and publishers and its repertoire covers many musical genres. (Rodgers D.T. 6-7.)

**c. Aspects Common to BMI and ASCAP**

27. Both BMI and ASCAP license their repertoires to businesses that use music in a wide variety of industries, including radio stations, television stations and networks, restaurants, nightclubs, concert halls, arenas, theme parks, retail stores, aerobic and dance studios, airlines and background music services. (Smith D.T. 3; Rodgers D.T. 5.)

28. BMI and ASCAP each license their respective repertoires on a "blanket" license basis which offers the user unlimited access to the repertoire for one annual fee. (Smith D.T. 3-4; Willms D.T. 5; see Rodgers D.T. 5-6.) Blanket licensing is generally the preferred method of licensing public performing rights to large scale users of music such as television and radio broadcast stations and networks. (Willms D.T. 5; Reimer D.T. 3-4.) The three older commercial broadcast television networks have licenses that cover their network programming "through to the viewer." (Willms D.T. 5.) This means that the license covers the network's transmission of the programming to its affiliated stations as well as their simultaneous retransmissions to local audiences. (Willms D.T. 5.) Individual commercial television stations, including those affiliated

with ABC, NBC and CBS, have their own licenses that cover local and syndicated programming. (Willms D.T. 5.) The Public Broadcasters have in the past agreed to and now seek blanket forms of licenses from BMI and ASCAP. (Jameson D.T. 4.)

29. All BMI's revenues from licensing the public performing rights in its repertoire, after allowance for operating expenses and cash reserves, are paid out by check on a quarterly basis to BMI's affiliates based on comprehensive surveys of television and radio performances. (Smith D.T. 3-5; Willms D.T. 2.) ASCAP also pays out licensing revenues to its members. (Rodgers D.T. 9.)

30. BMI and ASCAP also license the works of a vast number of foreign songwriters and composers through reciprocal arrangements with over 50 foreign performing rights societies around the world. (Smith D.T. 3; Rodgers D.T. 3.)

31. According to the Register of Copyrights, for most professional composers and songwriters royalties received from BMI or other performing rights organizations are their single largest source of income from their copyrights. (Smith D.T. 4, citing Statement of Marybeth Peters, Register of Copyrights, Before the House of Representatives Subcommittee on Courts and Intellectual Property, 105th Cong., 1st Sess. 2 (July 17, 1997) (BMI Exh. 1).)

## **2. The Public Broadcasters**

32. The Public Broadcasters in this proceeding comprise PBS, NPR, and CPB. Neither PBS nor NPR is a true "network" in the sense of ABC, CBS and NBC, because they do not distribute essentially all their programming for simultaneous performance on all affiliated stations. (Willms D.T. 5-6; Tr. 1967 (Downey); Tr. 2368, 2444-45 (Jablow).) All non-commercial television and radio broadcasters eligible to receive funding from the CPB are

represented by PBS and NPR in this proceeding. (Downey D.T. 7 n.1.) The total public broadcasting system revenues for 1996 were \$1.96 billion. (Public Broadcasters Exh. 4.)

**a. PBS**

33. PBS is a private, non-profit, satellite based television system whose member stations broadcast PBS-distributed and other programming throughout the United States. (Tr. 1967 (Downey).) There are approximately 356 public television stations in the United States, virtually all of which are PBS member stations. (Downey D.T. 7.) Each PBS member pays an annual assessment to PBS for distribution of services and also provides to PBS funds with which PBS acquires programming. (Tr. 1967 (Downey).) PBS itself does not produce programming. (Tr. 1967 (Downey).) PBS is owned by its member stations. (Day D.T. 3.) A handful of public television stations (*e.g.*, WNET in New York and WGBH in Boston) produce a substantial proportion of the programming for national distribution by PBS through its National Programming Service. (Willms D.T. 6.) Stations such as WNET and WGBH are \$100 million per year organizations in and of themselves with large production budgets, and WNET alone has an endowment of over \$70 million. (Willms D.T. 6; Tr. 606-08 (Ledbetter); ASCAP Exhs. 404, 408.) The total public television system revenues for 1996 were \$1.49 billion. (Public Broadcasters Exh. 4.)

**b. NPR**

34. NPR is a private, non-profit, satellite based radio system whose member stations broadcast NPR-produced and other programming throughout the United States. (Tr. 888-89, 902-03 (Unmacht); Jablow D.T. 4.) There are at least 691 public radio stations supported with

CPB funding operating in the United States. (Jablow D.T. 4.)<sup>2</sup> Of these stations, approximately 594 are NPR members. (Jablow D.T. 4.) The total public radio system revenues for 1996 were \$469 million. (Public Broadcasters Exh. 4.) NPR is owned by its member stations.

**c. CPB**

35. The CPB is a private, non-profit corporation which partially funds PBS and NPR member stations. (Jameson D.T. 6-7.) It is not a broadcaster and neither produces nor distributes programming. (See Jameson D.T. 6-7; Tr. 2664 (Jameson.)) The CPB has in the past funded all the section 118 music copyright fees of PBS and NPR stations, using part of a fund authorized by Congress. (Jameson D.T. 8-9.) The CPB is not a licensee under or signatory to the Public Broadcasters' licenses with BMI or ASCAP. (Tr. 2664 (Jameson).)

**B. Procedural History**

36. On October 18, 1996, the Copyright Office published a notice in the Federal Register announcing the procedural schedule for this proceeding and setting December 13, 1996 as the deadline for filing notices of intent to participate. (61 Fed. Reg. 54458 (1996).) BMI, ASCAP, PBS, NPR, and others filed notices of intent to participate. The procedural schedule set January 10, 1997 as the date for filing of direct cases.

37. The parties requested that the Copyright Office vacate its scheduling order to give them an opportunity to reach a voluntary agreement through settlement negotiations, as they had for the prior 15 years. The Copyright Office agreed to do so and, by Order dated December 23, 1996, vacated its scheduling order and scheduled a status conference for May 1, 1997.

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2. According to the testimony of Robert Unmacht, there appear to be 707 public radio stations. (Unmacht D.T. 6.)

38. The parties conducted private negotiations and, at the May 1, 1997 status conference, asked the Copyright Office for a further extension until July 1, 1997 to continue their negotiations.

39. On July 24, 1997, at the final status conference, the parties advised the Copyright Office that they had been unable to reach agreement. By Order dated July 30, 1997, the Copyright Office then directed the parties to file written direct cases no later than October 1, 1997 and set the procedural schedule for the remainder of the proceeding. On October 1, 1997, the Public Broadcasters, BMI, and ASCAP each filed written direct cases.

40. A pre-controversy discovery period followed in which the parties exchanged requests for documents, produced documents, exchanged follow-up requests for documents, and participated in motion practice over various discovery and other issues.

41. Among other things, the Public Broadcasters requested that the CARP proceeding be bifurcated into a first phase that would determine the overall royalty obligation of the Public Broadcasters and a second phase which would determine the division of royalties between ASCAP and BMI. (Direct Case of the Public Broadcasters, Volume I at 3; Jaffe D.T. 6-7; Motion to Bifurcate by the Public Broadcasters, dated Nov. 14, 1997.) BMI and ASCAP both objected on the grounds that bifurcation was not consistent with section 118 and would impose enormous burdens on BMI and ASCAP.<sup>3</sup> By Order dated December 9, 1997, the Copyright

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3. See ASCAP's Objection to the Public Broadcasters' Request for Bifurcated Proceedings, dated Nov. 14, 1997; ASCAP's Opposition to the Public Broadcasters' Motion to Bifurcate, dated Nov. 25, 1997; Opposition of Broadcast Music, Inc. to PBS/NPR/CPB's Motion to Bifurcate, dated Nov. 25, 1997; ASCAP's Reply to Public Broadcasters' Response to ASCAP's Objection to the Public Broadcasters' Request for Bifurcated Proceedings, dated Dec. 3, 1997.

Office denied the Public Broadcasters' motion to bifurcate the proceeding on several grounds, including the ground that the CARP should be allowed to examine the various proposals concurrently in a single proceeding.

42. The Public Broadcasters also moved to strike portions of the direct cases of BMI and ASCAP going to their music usage studies for supposed failure to produce certain underlying documents. BMI, at substantial expense, produced large quantities of documents. While BMI was ordered to produce certain documents, none of its direct case was stricken. (See Order, dated Dec. 30, 1997, at 13-14.)<sup>4</sup>

43. On February 3, 1998, the Panel held its first procedural meeting. Thereafter, over sixteen hearing days, the parties presented testimony to the Panel.

44. During the CARP hearing, the Public Broadcasters moved to introduce in evidence BMI and ASCAP joint proposals with certain non-profit religious, college and university, and community based radio stations represented by the National Religious Broadcasters Music License Committee, the National Federation of Community Broadcasters and the American Council of Education. By Order dated March 31, 1998, the Panel denied this motion on several grounds, including the ground that the Public Broadcasters had failed to show the comparability of these very small entities to the large, well-funded Public Broadcaster entities who are parties to this proceeding.

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4. The Public Broadcasters, in a later brief, conceded that all discovery issues with BMI were quickly resolved. (Public Broadcasters' Motion to Strike Certain Testimony of Dr. Peter Boyle, dated Feb. 18, 1998, at 5.)

45. The Public Broadcasters also moved to compel the production of the final license fees payable by three television networks, ABC, CBS and NBC, and commercial local television stations to each of BMI and ASCAP for each year from 1978 through 1996, and the annual license fees called for under the license agreements, if any, BMI and ASCAP had concluded with certain of the three networks. By Order dated April 6, 1998, the Panel denied the motion, stating that this evidence was not critical to any of the parties' methodologies in this proceeding.

46. At the conclusion of the parties' direct cases, the Panel by Order dated April 8, 1998, directed the Public Broadcasters to submit to the Panel a copy of the voluntary license agreement negotiated between the Public Broadcasters and SESAC, including the applicable rate terms, for the 1998 through 2002 period, or to show cause why they could not comply with the Panel's order, or why they should not be required to comply. The Public Broadcasters stated they could not comply, in part on the ground that the SESAC fee was confidential. (Tr. 3022-23.) After BMI agreed to restate its minimum fee request on the basis of the fees awarded to ASCAP and BMI alone, the Panel withdrew its April 8, 1998 Order. (Tr. 3024-25, 3033.)

#### 1. BMI Witnesses

47. On behalf of BMI, the following witnesses testified as to the following subjects. Alison Smith, the vice president of performing rights for BMI, testified as to BMI's history, the BMI repertoire, BMI music in PBS programming and BMI music on public radio stations. Fredric J. Willms, the senior vice president, finance and administration, and chief financial officer of BMI, testified as to BMI's fee proposal for public television stations, BMI's license agreements with commercial television broadcasters, a comparison of music usage between commercial and non-commercial television broadcasters, BMI's increasing share of music in public television programming, BMI's fee proposal for public radio stations, and BMI's prior

agreement with the Public Broadcasters. Dr. Bruce M. Owen, a professional economist and president of Economists Incorporated, testified that the appropriate way to find the fair market value of the section 118 licenses for the Public Broadcasters was to compare them to the fees paid for the same licenses by commercial broadcasters, and as to his calculation of the range of BMI's proposed fees for public television and public radio based on the comparison of BMI's commercial rates adjusted for relevant differences. Michael Bacon, a BMI-affiliated composer for twenty-five years, testified as to the importance of performing rights royalties to composers, the process of composing for television, and the music he has composed for PBS and commercial programs, and compared the royalties he received for performance of his music on commercial and public television. Janet R. McFadden, formerly a producer for the National Geographic Society and WGBH, testified as to how a musical score was commissioned and created for a public or commercial television program and as to National Geographic programs which were aired both on commercial and public television. Dr. Roy J. Epstein, a professional economist and vice president of Analysis Group Economics, testified as to the methodology for the music usage study performed by Lexecon, Inc. with respect to local television programming in 1992.

48. Dr. Owen and Mr. Willms offered rebuttal testimony. Marvin L. Berenson, BMI's general counsel, also gave rebuttal testimony as to BMI's prior fee negotiations with the Public Broadcasters and the reasons why BMI did not institute a Copyright Royalty Tribunal proceeding in 1992 with the Public Broadcasters.

## **2. ASCAP Witnesses**

49. On behalf of ASCAP, the following witnesses testified as to the following subjects. Mary Rodgers, a composer, member of ASCAP and director of ASCAP, testified as to the history of ASCAP, the operations of ASCAP, the ASCAP repertoire and ASCAP's

membership and organizational structure. Richard H. Reimer, vice president-legal services at ASCAP, testified as to the regulatory background concerning ASCAP's activities and the negotiations and litigations surrounding licenses with commercial television and radio. Bennett M. Lincoff, the director of legal affairs for new media for ASCAP, testified as to the framework for ASCAP's licensing of public broadcasting, and the licenses between ASCAP and public broadcasting from 1978 to the present. Jon A. Baumgarten, a partner of Proskauer Rose LLP and former general counsel of the United States Copyright Office, testified as to the history of section 118 of the 1976 Copyright Act, the terms of section 118, the role of performing rights organizations under section 118, Congress's expectation that there be individual rates set under section 118, and the first section 118 proceeding and resulting 1978 rate schedule. James Ledbetter, a professional journalist and author of a book about public broadcasting, testified as to his analysis of public radio and television as both have evolved since 1978, including the financial development of both and their comparability to commercial television and radio. Seth Saltzman, ASCAP's director of performances, testified as to the range of ways ASCAP members' compositions are performed by public broadcasting stations across the United States. Carol Grajeda, a senior legal assistant at White & Case, testified as to the documents she was asked to obtain and which were made ASCAP exhibits.<sup>5</sup> Ed Bergstein, senior vice president of Audits & Survey Worldwide, testified as to a study commissioned by ASCAP's counsel to measure the levels of music program viewership on PBS television stations. Robert Unmacht, president of M

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5. Certain of these exhibits were subject to a motion to strike by the Public Broadcasters dated November 14, 1997 and renewed by the Public Broadcasters on March 12, 1998. (Tr. 784-85.) That motion was denied by Order dated April 28, 1998.

Street Corporation, testified as to his analysis of the operation of radio stations in the United States which operate under non-commercial FCC licenses and currently receive, or are eligible to receive, CPB funding or are affiliated with NPR. James Day, president of Publivision, Inc., former president of several major public television stations and author of several works on public broadcasting, testified as to a historical overview of public broadcasting in the United States, focusing on public television's structure, internal relationships, programming mission and sources of funding. Horace Anderson, an associate with White & Case, testified as to his comparison and analysis of the 1995-96 salary structure for various job categories of commercial and public radio and television stations. Lauren Iossa, assistant vice president of membership, marketing, and promotion at ASCAP, testified as to certain documents submitted as ASCAP exhibits reflecting ASCAP's membership, range and diversity of honors, awards and achievements bestowed on ASCAP members, and ASCAP's efforts to foster the musical arts and culture. Dr. Peter Boyle, vice president and chief economist of ASCAP, testified as to his analysis of appropriate license fees to be paid to ASCAP by the Public Broadcasters for the period 1998 through 2002 based on license fees paid to ASCAP by commercial television and radio broadcasters.<sup>6</sup>

50. On rebuttal, Dr. Boyle testified again. In addition, Hal David, a songwriter, ASCAP member and ASCAP director, testified as to the prior license negotiations between

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6. By letter filed on March 17, 1998, ASCAP withdrew the direct written testimony of Ray Schwind and David Bander along with ASCAP Exhibits 28 and 29, sponsored by Mr. Schwind, and ASCAP Exhibits 30 and 31, sponsored by Mr. Bander. No objection was filed and the Panel by Order dated March 24, 1998 struck this testimony and these exhibits from the record.

ASCAP and the Public Broadcasters. Dr. Elisabeth M. Landes, vice president and senior economist at Lexecon, Inc., also testified concerning an evaluation of the methodology employed by Dr. Adam B. Jaffe, the expert witness for the Public Broadcasters in this proceeding.

### **3. Public Broadcasters Witnesses**

51. On behalf of the Public Broadcasters, the following witnesses testified as to the following subjects. M. Peter Downey, senior vice president of program business affairs for PBS, testified as to an overview of public television and its operations, the mission of public television, public television programming, PBS's role in the operations of public television, the funding of public television, trends in public television's broadcasting operations, and program production and acquisition expenditures. Peter Jablo, chief operating officer, chief financial officer, executive vice president and treasurer of NPR, testified as to an overview of public radio and its operations, the mission of public radio, NPR's role in the operations of public radio, public radio programming and programming trends and trends in public radio operations. Paula A. Jameson, former senior vice president, general counsel and secretary of PBS, testified as to the prior negotiations of the Public Broadcasters with BMI and ASCAP, background of the Public Broadcasting Service, and CPB funding. Dr. Adam B. Jaffe, a professional economist and principal in The Economics Resource Group, Inc., testified as to the blanket license market, and the Public Broadcasters' proposed methodology for determining license fees based on prior agreements with BMI and ASCAP. On rebuttal, Dr. Jaffe and Ms. Jameson testified again.

52. The Panel set May 29, 1998, as the date for the filing of Proposed Findings of Fact and Conclusions of Law, June 8, 1998, for submission of Reply Findings and Conclusions, and June 16, 1998, for oral argument.

## II. SECTION 118 OF THE COPYRIGHT ACT

### A. The Panel's Authority Under Section 118

53. Section 118 of the 1976 Copyright Act established for the first time a compulsory license for the performance of copyrighted works by public broadcasting entities and a regime under which performing rights organizations could negotiate voluntary music license agreements with the performing rights organizations. (17 U.S.C. § 118; Baumgarten D.T. 9-10.)

54. The copyright law provides various exclusive rights to authors and owners of copyrighted works. These exclusive rights, enumerated in 17 U.S.C. § 106, are intended to be broad and sweeping. The rationale for the copyright law has been clearly enunciated by the United States Supreme Court: "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row Publishing, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985) (ASCAP Exh. 18). *See also Mazer v. Stein*, 347 U.S. 201, 219 (1954).

55. Section 106 specifies the various exclusive rights that copyright ownership affords. (17 U.S.C. § 106; Baumgarten D.T. 3.) They include the right, in the case of "literary, musical, dramatic, and choreographic works," to perform the work publicly (that is, "the right of public performance.") (17 U.S.C. § 106; Baumgarten D.T. 3.) These exclusive rights, like any form of property, may be transferred to others. (Baumgarten D.T. 3.)

56. The broadcast, whether by radio or television, of a musical composition under copyright, is a public performance of that composition. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 16 (1979) ("individual radio or television stations or . . . others who perform copyrighted music . . ."). As such, any broadcast of a copyrighted musical work would be an infringement of

the owner's rights unless authorized by the owner, excused by some particular exemption granted by the law, or licensed pursuant to other provisions of the copyright law. (Baumgarten D.T. 4.)

57. In 1976 Congress enacted a new copyright statute subjecting the non-profit, public broadcasters to copyright liability for public performances for the first time — the Copyright Act of 1976 (the "1976 Act"), 17 U.S.C. §§ 101 *et seq.*, which became effective January 1, 1978. (Baumgarten D.T. 3.) Section 118 as created by the 1976 Act provides for a compulsory license for noncommercial (or public) educational broadcasters. 17 U.S.C. § 118.

58. "The Public Broadcasting Act and the Copyright Act were designed to achieve at least one common objective — the promotion of artistic and cultural productivity." (Willms D.T. 7, citing Statement of Charles McC. Mathias, Jr., in *In the Matter of 1989 Cable Royalty Distribution Proceedings*, Docket No. 91-2-89 CD, August 15, 1991, at 1, incorporated by reference herein by BMI.)

59. Section 118 contains the following provisions. First, public broadcasters and copyright owners are encouraged to negotiate and agree upon the terms and rates of royalty payments. (See 17 U.S.C. § 118 (b); Baumgarten D.T. 9.) Authors and copyright owners are authorized to designate common agents to negotiate, agree to, pay, or receive payments. (See 17 U.S.C. § 118(b); Baumgarten D.T. 9.) Second, to provide for the case in which parties do not agree, the Copyright Royalty Tribunal established under the Act was to conduct a proceeding in 1978 and, if necessary in 1982, and every five years thereafter in which it would determine "reasonable terms and rates of royalty" for covered works and activities. (See 17 U.S.C. § 118(c); Baumgarten D.T. 10.) Finally, license agreements voluntarily negotiated at any time "between one or more copyright owners and one or more public broadcasting entities" are, if filed with the Register of Copyright within thirty days of execution, to be given effect "in lieu of

any determination by the Librarian of Congress." (See 17 U.S.C. § 118(b)(2); Baumgarten D.T. 10.)<sup>7</sup> The CRT was abolished in 1993 and replaced with a system of CARPs, but the substance of Section 118 was not thereby changed. (See Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198 § 4(1)(E)(ii), 1993 U.S.C.A.A.N. (107 Stat. 2304) 2309 (effective Dec. 17, 1993).)

**B. Under Section 118, The Panel Is Required To Set A Fair Market Value, Subsidy-Free Rate**

60. This Panel has but one direction – to establish fair market value rates. 17 U.S.C. § 801(b)(1) (1994) directs the Panel to "make determinations as to reasonable terms and rates of royalty payments as provided in [17 U.S.C. §] 118." 17 U.S.C. § 801(b)(1) (1994). This is similar to the task the CARP faced in setting fair market value rates for satellite carriers. *In re Rate Adjustment for the Satellite Carrier Compulsory License*, Docket No. 96-3 CARP SRA, 62 Fed. Reg. 55742, 55746 (Oct. 28, 1997). Section 118(b) provides that the Panel should determine "reasonable terms and rates of royalty." *Cf. In re Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25394, 25400 (May 8, 1998) (The Register expressly contrasted four factor tests under section 114 with "reasonable rate" test under section 118).

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7. The parties to this proceeding entered into a stipulation dated March 13, 1998 agreeing that the fees set by this Panel would apply retroactively commencing on January 1, 1998:

"the rates and terms of royalty payments determined in this proceeding shall be effective for the period January 1, 1998 through December 31, 2002 [and that] such determination shall provide for such rates and terms to be effective retroactively to January 1, 1998 even though actually determined thereafter . . . ."

61. All the parties to this proceeding agree that the task of the Panel is to determine fair market value rates to be paid by the represented noncommercial broadcasters for the right to broadcast unlimited quantities of the music in the repertoires of BMI and ASCAP during the five years 1998-2002. Counsel for the Public Broadcasters conceded this in his opening statement.<sup>8</sup>

62. The Public Broadcasters' economic expert testified that the analysis he was asked to perform was to "look at the information before me and to form an opinion as to the appropriate fee based on *reasonable market value* for the broadcast performance rights that the public broadcasters need to acquire from ASCAP and BMI." (Tr. 2705 (Jaffe) (emphasis added).) (See also Tr. 2786 (Jaffe) (task of the CARP is to determine as best as it can the fair market value of the performing rights licenses for BMI and ASCAP for public television and public radio).)

63. BMI's economic expert witness also testified that he was "requested to provide an estimate of the music licensing payments that would be made to BMI by public broadcasters if this fee were negotiated as a market transaction." (Owen D.T. 1.) This is in conformity with

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8. "The determination involves finding reasonable compensation for the use of ASCAP's and BMI's members works by Public Broadcasting. Now, it also seems, to us, that there is little doubt in the context of such a proceeding, what the meaning of the term 'reasonable' must have ascribed to it. *And, in our view 'reasonable' must mean an approximation of the license fees that a freely competitive market would produce for their transactions, enabling us, in a free market, to determine the value of performances of music occurring on non-commercial broadcasting, be it television and/or radio . . .* Notably, and I'd like to come back to this in a few moments, the recently concluded Satellite Carrier proceeding, compulsory license proceeding, entailed precisely the same inquiry. They are under Section 119, prescription was that the Panel ascertain '*The fair market value of the rights involved.*' *And we submit that this Proceeding entails exactly the same inquiry.* [sic]" (Tr. 8-10 (emphasis added).)

BMI's position that songwriters, composers and publishers should be fully and fairly compensated. (Willms D.T. 7.)

64. ASCAP also agreed the purpose of this proceeding is for the Panel to determine the fair market value of the licenses to the Public Broadcasters. ASCAP expert witness and former general counsel of the United States Copyright Office Jon A. Baumgarten testified that the substantive standard to be used is "fair value," which in his view was the same as "fair market value." (Baumgarten D.T. 11; Tr. 447-48 (Baumgarten).) ASCAP's economic expert witnesses testified that ASCAP's members should receive license fees at fair market value from public broadcasting. (See Boyle D.T. 3; Landes R.T. 2.)

65. The Public Broadcasters and BMI agree, and ASCAP does not dispute, that fair market value is the price at which goods or services would change hands between a willing buyer and a willing seller neither being under a compulsion to buy or sell and both having reasonable knowledge of all relevant facts. (Tr. 2786 (Jaffe); Tr. 1465 (Owen).) This is, in fact, the dictionary definition of fair market value. (See, e.g., *Black's Law Dictionary* 537 (6th ed. 1990).)

66. The Panel's duty to set a fair market value rate of the music license under section 118 is confirmed by the legislative history, which makes clear that the rate should be subsidy-free.

67. The legislative history makes plain that the substantive standard which the Copyright Royalty Tribunal was to use, and its successor Copyright Arbitration Royalty Panels are to use, in setting rates is one of fair market value. The Senate Judiciary Committee stated in its 1975 report:

" . . . The compulsory license is intended to ease public broadcasting's transition from its previous not for profit exemption under existing the copyright law. *As such, this provision does not*

*constitute a subsidy of public broadcasting by the copyright proprietors since the amendment requires the payment of copyright royalties reflecting the fair value of the materials used."*

(S. Rep. No. 94-473, 1st Sess. at 101 (1975) (ASCAP Exh. 4) (emphasis added.); Baumgarten D.T. 11.)

68. The House Judiciary Committee Report reiterated this point:

"The Committee does not intend that owners of copyrighted material be required to subsidize public broadcasting."

(H.R. Rep. No. 94-1476, at 118 (1976) (ASCAP Exh. 5); Baumgarten D.T. 11.)

69. Because a subsidy exists when goods or services are purchased at below-market prices (Owen D.T. 2), a subsidy-free fee is by definition one that reflects fair market value.

70. As former Copyright Office general counsel Baumgarten testified, the evidence in the legislative history of express Congressional intent against copyright owners' subsidization of public broadcasting is pervasive. (Baumgarten D.T. 11.) The fees for public broadcasting should only differ from those for commercial broadcasting if commercial broadcasting differs in a relevant way in using music. (Tr. 530-32 (Baumgarten).)

71. The Public Broadcasters agree that the task of the Panel is to set a subsidy-free fee. As Dr. Jaffe testified on behalf of the Public Broadcasters:

"Q: Do you understand from the work you've done that part of the job of the CARP is to insure that there is no subsidy in the license fee?

"A: Yes, I do understand that."

(Tr. 2813 (Jaffe).)

### III. THE PRIOR AGREEMENTS BETWEEN THE PUBLIC BROADCASTERS AND BMI AND ASCAP

72. The first music license agreement entered into under section 118 by the Public Broadcasters was with BMI in 1978. (Public Broadcasters Exh. 21.) The 1978 agreement contained a provision under which the BMI license fee could be increased or decreased in each year from 1979 to 1982 if BMI's music usage increased or decreased on PBS and NPR programs. (Public Broadcasters Exh. 21 at 5.) BMI then entered into successive agreements with the Public Broadcasters in 1982 (Public Broadcasters Exh. 14), in 1987 (Public Broadcasters Exh. 15) and in 1992 (Public Broadcasters Exh. 16). The 1982, 1987 and 1992 agreements each contained a non-disclosure provision which does not allow the parties to reveal the terms of those agreements to a third party, expressly including the Copyright Royalty Tribunal. (Public Broadcasters Exhs. 14 (Confidential Agreement at 1), 15 (Confidential Agreement at 1), and 16 (Confidential Agreement at 1).)

73. Unlike BMI, ASCAP was unable to reach agreement with the Public Broadcasters in 1978 and, under section 118, a Copyright Royalty Tribunal ("CRT") proceeding was commenced and music license fees for ASCAP were set by the CRT. (See Baumgarten D.T. 16-18.) Subsequently, ASCAP entered into voluntary license agreements with the Public Broadcasters in 1982 (Public Broadcasters Exh. 11), in 1987 (Public Broadcasters Exh. 12), and in 1992 (Public Broadcasters Exh. 13). Each of these agreements contains a no-precedent clause whereby the parties agreed that the license fee would have no precedential value before the Copyright Royalty Tribunal. (Public Broadcasters Exhs. 11 at 4, 12 at 4, and 13 at 4.)

#### **IV. PUBLIC BROADCASTING FEES SHOULD BE BASED UPON THE FEES PAID BY COMMERCIAL BROADCASTERS**

74. For purposes of setting a fee in this proceeding, BMI looked to its prior agreements with Public Broadcasters, and after careful consideration, decided they were not appropriate benchmarks for setting the fees in this case for 1998-2002 for the reasons discussed in detail at ¶¶ 175-194. (Tr. 1443-44 (Owen); Willms D.T. 27-29; Berenson R.T.)

75. BMI has proposed a methodology for the Panel to use to determine a subsidy-free fee based on a comparison between public broadcasting and commercial broadcasting. In proposing that the Panel should use commercial broadcasting fees as a benchmark to set the fees for the Public Broadcasters, BMI does not assert that commercial broadcasting and public broadcasting are alike in every respect. But the evidence shows that commercial broadcasting and public broadcasting are alike in the respects that are relevant to the issue before the Panel. Moreover, to the extent that public broadcasting and commercial broadcasting are different, BMI's methodology takes these differences into account.

##### **A. The Similarities Between Commercial Television Broadcasting and Public Television Broadcasting For The Purposes of Setting Music Licensing Fees**

76. There are numerous, relevant similarities between commercial television broadcasting and public television broadcasting from the standpoint of music use.

##### **1. Similarities In Transmission and Nature Of Programming**

77. Both commercial and public television broadcasting provide audiovisual entertainment and information to mass audiences. (Owen D.T. 2; Tr. 1441 (Owen).) In fact, public television stations compete with commercial television for viewers. (Tr. 2234-35 (Downey).) Public television broadcasters reach 80 percent of the United States viewing public

each month. (Tr. 2235 (Downey).) The programming for both commercial and public television is transmitted over the same media (over-the-air, cable, etc.) and it is received on the same equipment in the same households. (Owen D.T. 2.) Public television programming is also quite similar to commercial programming in terms of the types and nature of programming. (Owen D.T. 2; Willms D.T. 8.) Both commercial and public television stations broadcast children's programming, films, popular music and other concerts, 30-minute and one-hour dramas, comedies and dramatic serials, and news and public affairs. (Owen D.T. 2; Tr. 1441 (Owen); Willms D.T. 8; Tr. 1226-27 (Willms); Downey D.T. 21.)

78. Indeed, a series such as *National Geographic Specials* is produced for, and broadcast by, both commercial and public stations. (McFadden D.T. 4-5; Willms D.T. 8.) For example, when National Geographic has produced its specials, it was not known until long after production had begun whether the particular program would ultimately be licensed to PBS or NBC. (See McFadden D.T. 4.) As a result, National Geographic has produced programs of the same high quality regardless of the broadcast venue. (McFadden D.T. 4-5.) Therefore, the quality of the National Geographic programs aired by NBC has been no different from those aired by PBS. (McFadden D.T. 5.)

79. Often the same programs appear on public and commercial television. For example, in the late 1980's and early 1990's, the fastest growing show on public television was reruns of *The Lawrence Welk Show*, the popular music and variety show aired on commercial television for years. (Ledbetter D.T. 5-6; Tr. 593-94 (Ledbetter).) Other examples include *Disney*, *The Avengers*, *Lassie*, *Ozzie and Harriet* and *Star Trek*. (Tr. 593-94 (Ledbetter).)

## **2. Similarity In Inputs Used To Create Programming On Public and Commercial Television**

80. The inputs used to produce programming for commercial and public television, including writers, musicians, producers, directors, composers and artists, as well as production equipment and materials, are also quite similar. (Owen D.T. 2; Tr. 1441 (Owen); Willms D.T. 9.) Moreover, often the same individuals work on both commercial and public television. For example, BMI witnesses Janet McFadden, formerly a producer, and Michael Bacon, a composer, have done work for both commercial and public television. (McFadden D.T. 1; Bacon D.T. 2.) And when hiring composers to score its hour-long films, National Geographic would draw from its "top-tier" documentary composers, using the same list whether the program was slated for NBC or PBS. (McFadden D.T. 5.) Public television stations like WGBH in Boston have their own in-house studios which contain the latest equipment, produce state-of-the-art programming and have similar capabilities to that of production facilities at commercial networks. (See Bacon D.T. 5.)

## **3. Similarity In The Manner In Which Music Is Used In Programming On Public and Commercial Television**

81. It is undisputed that public television programming is comparable to commercial television in terms of the extent and intensity of its BMI music use (Willms D.T. 8), and actually uses music overall more intensively than commercial broadcast television. (Willms D.T. 9; Owen D.T. 8; Smith D.T. 8; see Jaffe D.T. 15-21 & Data Underlying Figures 5 and 6 (Corrected).) Both public and commercial television programming use music in three ways: as feature performances of songs and other musical works, as background music which sets the tone and advances the plot of fiction and non-fiction programs, and as theme music which identifies programming for the audience. (Willms D.T. 8-9.) Often the very same composers are hired to

produce music for both public and commercial television. (Willms D.T. 9; Bacon D.T. 2; McFadden D.T. 5.) In addition, the technical and artistic quality of music on public television is the same or surpasses that on commercial television. (See Bacon D.T. 4-5; McFadden D.T. 3-4.) As a result, the programs on public television containing music often require an enormous amount of time and effort to complete the composing work. (Bacon D.T. 5.)

82. Children's programming, which forms the heart of public television programming, is heavily dependent on music. (Smith D.T. 8.) Children's programming constitutes by far the largest category of PBS programming, with a share of about of the total air time of PBS network programs in 1993, increasing to in 1996. (Smith D.T. 8.) This means that in 1996, children's programs were broadcast for hours out of a total hours of air time of PBS network programming on its member stations. (Smith D.T. 8.) PBS confirms that children's and youth programming account for approximately 29 percent of all broadcast hours on PBS member stations, the largest single category. (Downey D.T. 21; Public Broadcasters Exh. 3.) These shows include *Barney & Friends* (the number 1 rated daily PBS program) (with music written and arranged by BMI affiliate Bob Singleton), the Emmy award winning *Wishbone* (with music composed by BMI affiliate Tim Cissell), and *The Magic School Bus* (with music composed by BMI affiliate Peter Lurge). (Smith D.T. 10-11; BMI Exhs. 2, 3, 4, 22.) PBS also confirms that viewership of children's programming on public television has shown a remarkable 18 percent increase between 1996 and 1997. (Tr. 2244 (Downey); ASCAP Hearing Exh. 14X, at 13.)

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83. Other programs with extensive music use appear on public television also. These include wall-to-wall music shows appearing during pledge weeks and series like *Rock and Roll*. (Smith D.T. 11; BMI Exh. 23; see also Saltzman D.T. 3-6.) In August 1997, for example, public

stations WNET and WLIW filled their prime time hours with music programs as part of their pledge drives. (ASCAP Hearing Exh. 201.)

84. The same pieces of music, moreover, are broadcast by public television and commercial television. (Saltzman D.T. 6.) This is evidenced by Mr. Saltzman's search of matching title codes in the ASCAP 1996 Distribution Survey, which showed that 3,465 of the same ASCAP songs were broadcast at least once by both public television and commercial broadcast television in that year. (Saltzman D.T. 6-7; ASCAP Exhs. 203, 204.)

#### 4. Similarity In Nature Of The Work Done By Composers

85. Composers rely on the royalties they receive from BMI to support their families and to maintain offices and studios with which to provide their clients with a professional level of service. (Bacon D.T. 3.)

86. The same composers write and arrange music for both public and commercial television. (See McFadden D.T. 5) The process of composing of music for a television program is the same regardless of whether the program appears on public or commercial television. (Bacon D.T. 4-5.)

87. In fact, if anything, composing music on public broadcasting is more demanding of a composer's time and talents because PBS programs can require more music. (Bacon D.T. 4-5.)

88. Composers of specially-created music for public and commercial television – such as theme and background music for a series or a special – generally receive compensation for their works in two ways: (1) upfront payments at the time they contract to create the music and (2) back-end royalties from BMI or ASCAP based upon the actual performances of their music

on public or commercial television.<sup>9</sup> The up-front fees a composer receives for composing music for public television are no less than those for commercial television. (Tr. 1636 (Bacon).)

89. Despite the similarities between public and commercial broadcast television in terms of the process of composing music, the time commitment involved in composing, and the similarities in the amount of up-front fees received, there is a large disparity in the back-end performance royalties a composer has heretofore received for music performed on public television as opposed to music performed on commercial television. (Bacon D.T. 5-6.) For example, whereas Mr. Bacon received \_\_\_\_\_ for theme music in eighteen public television performances of the "D-Day" episode of *American Experience* in 1996, he would have received \_\_\_\_\_ had this same music been performed on eighteen commercial broadcast network-affiliated stations. (Bacon D.T. 6.)

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Mr. Bacon's payments were based on BMI payment schedules used for all composers and are typical of what composers have been paid by BMI using available funds from commercial and non-commercial broadcast television respectively. (See Smith D.T. 4; Willms D.T. 2.)

##### 5. The Increasing Commercialization Of Public Television Over The Last Twenty Years

90. An additional factor that supports the use of commercial broadcasting fees as a benchmark to set the fees for the Public Broadcasters is that public broadcasting has become

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9. The Public Broadcasters admit that 85 percent of all BMI and ASCAP music on public television in 1991 was specially composed for public broadcasting. (Jaffe R.T. 18 n.6.)

more entrepreneurial in the last twenty years, as shown by the increased use of corporate underwriting and other commercial fundraising activities.

91. Public television has been evolving and has become more attractive and clearly more "commercial" in quality and appearance, particularly in the 1990's. (Willms D.T. 9; Owen D.T. 2.) Jennifer Lawson, a former executive vice president for national programming and promotion services for PBS and a witness in the 1990-92 Cable Royalty Distribution Proceeding, testified there about the dramatic changes that were made in the 1990's "that were aimed at increasing the attractiveness and visibility of public television as a major alternative to commercial television." (Willms D.T. 9-10, quoting Written Direct Testimony of Jennifer Lawson in the 1990-92 Cable Royalty Distribution Proceeding, Docket No. 94-3 CARP CD 90-92, Aug. 18, 1995, at 7, incorporated by reference herein by BMI.)

92. In addition, public television relies in part on commercial sponsorship (that is, corporate "underwriting") of programs just as commercial television broadcasters do (Owen D.T. 3; Tr. 1441 (Owen); Willms D.T. 10; BMI Exh. 30), and this has become increasingly the case in the past twenty years. As demonstrated by the videotaped commercial messages that aired on public television for Polaroid, Baby Gap and Chef Boyardee, among others, shown during the direct testimony of Mr. Willms, and as conceded by the Public Broadcasters, underwriting messages on public television are increasingly similar to commercial advertisements. (Willms D.T. 10; Tr. 1228 (Willms); BMI Exh. 28; Tr. 2101 (Downey).) As is evidenced by these spots, public broadcasting has increasingly aimed its marketing towards children in particular. (Tr. 618 (Ledbetter); BMI Exh. 28.)

93. This growing similarity between underwriting credits and commercials stems from the 1984 changes in the Federal Communications Commission ("FCC") rules, making them

less restrictive in terms of the type of corporate underwriting spots which could be shown on public television. (Day D.T. 10; Tr. 999 (Day).)<sup>10</sup> With the relaxed FCC rules, corporate underwriting has increasingly resembled commercial advertising and public television has received increasing revenues from this source. (Ledbetter D.T. 21-22; Tr. 611 (Ledbetter).) Corporate underwriters increasingly have thought of sponsorship on public television as something more commercial as well – the money used to pay for these corporate underwriting spots increasingly comes from advertising budgets, not budgets for philanthropy as in the past. (Tr. 614-15 (Ledbetter); Tr. 2018 (Downey).) In fact, the senior vice president of program business affairs for PBS admitted that public stations invite companies to become underwriters for commercial purposes such as enhancing their image in the market and increasing consumer awareness. (Tr. 2101-03 (Downey).)

94. Today many public stations, including those in major markets, have, in fact, pushed the envelope of commercialism by permitting corporate underwriting spots to extend to a full 30 seconds, like a commercial. (Tr. 690 (Ledbetter); Tr. 2075-76 (Downey).) Some of these spots are the *same* ones that appear on commercial television stations. (Tr. 1065 (Day).)

95. This increased commercialization is due in large part to the fact that public broadcasting has changed from mainly relying on government funds to aggressively seeking funds from private sources. (Ledbetter D.T. 33; Tr. 591-92 (Ledbetter).)

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10. PBS also has its own guidelines. (Tr. 2059 (Downey).) These, however, do not apply to local programming. (Tr. 2070 (Downey).)

96. The increased commercialization does not end with more corporate underwriting spots on public television. Merchandising and joint ventures with commercial partners have also become more prevalent. (Tr. 611 (Ledbetter); Tr. 2039 (Downey).) Public television actively markets merchandise in connection with its popular children's programs, such as *Barney* and *Sesame Street*. (Ledbetter D.T. 34; Tr. 2195-96 (Downey).) It is also involved in cross-promotional activities between some of its children's programs and various fast food chains. (Willms D.T. 10; BMI Exh. 30.) PBS invests in programs and now, unlike previously, expects a return on that investment in terms of an income or distribution share. (Tr. 2196 (Downey).) Public television licenses product tie-ins, just as commercial television does. (Willms D.T. 10; BMI Exh. 21; ASCAP Exhs. 515.5-.8, .12-.15, .19, 710.2-.3, .14-.18.)

97. Public television has recently combined with commercial media entities to form "strategic business partnerships." (Ledbetter D.T. 26-30; Tr. 621 (Ledbetter); Tr. 2039 (Downey).) Examples include partnerships with Reader's Digest, The Walt Disney Company and Time Warner Inc. (Tr. 2196-2198 (Downey).)

98. In addition, PBS and local public stations market products under their own labels. (Day D.T. 22-23.) For example, PBS has formed a record label. (Tr. 1014-15 (Day).) All of these efforts have been part of what PBS president Ervin Duggan has called an attempt to reinvent PBS as a "modern media enterprise" which can raise its budget by \$80 million without having to receive any more money from CPB or member stations. (Day D.T. 22, quoting Tim Goodman, "PBS heavy on the spin," *San Francisco Examiner*, July 29, 1997.)

99. In addition, PBS and the individual stations conduct ratings research to study audience demographics like commercial broadcasters. (Tr. 2236 (Downey).) PBS has a research department which receives many different kinds of Nielsen data, including daily data (so called

"overnights") in approximately 48 markets and data for 16 weeks out of the year for the entire country. (Tr. 2236-37 (Downey).) The PBS research department also commissions one to two studies each year with respect to ratings and viewership. (Tr. 2238 (Downey).) PBS uses demographic research, among other things, to convince corporations to place advertising dollars in "underwriting" of public television. In 1996, for example, PBS made a coordinated pitch to advertisers, offering season-long sponsorship spots on *Barney* for between \$250,000 and \$1.2 million each. (Ledbetter D.T. 25 (citing "Chef Boyardee to Underwrite New Season of PBS's 'Barney and Friends' and 'The Puzzle Place,'" PBS Press Release, June 23, 1997).) In 1997, a consortium of major producing television stations (WNET, WGBH, KCET and WETA) banded together into the PBS Sponsorship Group, which toured the country to meet with advertising executives and offered custom-designed packages in which advertisers could purchase time on a variety of PBS programs. (Ledbetter D.T. 25.) PBS has also increasingly attempted to match programs with the commercial needs of sponsors. For example, in 1992 PBS broadcast a program on the history of the computer sponsored by a computer manufacturer: it was called *The Machine That Changed the World*, and was underwritten with a \$1.9 million payment from the computer manufacturer Unisys Corporation. (Ledbetter D.T. 23; Tr. 613 (Ledbetter).)

**B. The Similarities Between Commercial Radio Broadcasting and Public Radio Broadcasting For The Purpose of Setting Music Fees**

100. It is undisputed that, like commercial radio stations, BMI music is used by all or virtually all NPR member radio stations. (Smith D.T. 14.) According to NPR, its member stations have formats which feature music in 64 percent of their programming, broken down into 33 percent classical, 17 percent jazz, 6 percent pop, 3 percent folk, 3 percent world music, and 2 percent eclectic. (Smith D.T. 17; BMI Exh. 6; Jablow D.T. 6-8.)

101. In its music-format programming, music is used the same way on public radio as it is on commercial radio as the focus of audience attention, the sole reason for listening at all. On public radio, like commercial radio, the music broadcast is primarily taken from commercially recorded compact discs and tapes, with some live or pre-recorded concerts.

102. BMI's music reports received from NPR show that NPR used BMI classical music and it is undisputed that public stations such as NPR station WBGO, one of the top jazz stations in the country, use BMI music intensively throughout their music programming. (See Smith D.T. 14-17.)

103. Both commercial and public radio provide audio programming to mass audiences. (Owen D.T. 3.) Both commercial and public radio programming is typically transmitted directly to receivers in homes, cars, offices and elsewhere. (Owen D.T. 3.) Commercial and public radio stations compete with each other for audience. (Unmacht D.T. 3-4; Tr. 1441 (Owen); Tr. 913, 927 (Unmacht) ("it's just one, continuous tuning dial").) In fact, as the chief operating officer of NPR conceded, public radio serves over 92 percent of the United States population. (Tr. 2411 (Jablow); ASCAP Exh. 302.) In 1996, according to CPB, there were twenty million weekly listeners to public radio. (BMI Exh. 6 at 15; Tr. 2568-69 (Jablow).) From 1986 to 1996, public radio listenership increased by more than 80 percent. (BMI Exh. 6 at 15.) There are multiple public radio programmers (other than NPR itself) providing programming through the public stations represented in this proceeding for mass audiences. (Ledbetter D.T. 40-43.) Individual public radio stations often capture a relatively large audience share of their rated market as compared to individual commercial radio stations. (Unmacht D.T. 8; ASCAP Exh. 711.) NPR stations take an active interest in maintaining and growing their audiences. It is undisputed that NPR has personnel who track its audience to help local stations with their on-air fund raising

(Tr. 2425-26 (Jablow)), and that CPB funded "Audience '98," a study that explored, among other things, the characteristics of the audience of public radio. (Tr. 2563-64 (Jablow).)

104. Both commercial and public radio provide news, talk, music, and related programming. (Owen D.T. 3.) There is no difference as to what public and commercial radio can program in terms of FCC rules. (Tr. 890 (Unmacht).) The inputs used to produce programming for commercial and public radio are similar. (See Tr. 896 (Unmacht).)

105. As with public television, as a result of relaxed FCC rules NPR has increasingly accepted corporate slogans and logos in its underwriting messages. (Tr. 2462-63 (Jablow).) Public radio stations aggressively seek corporate underwriting dollars. (Unmacht D.T. 16; ASCAP Exh. 312.) In fact, CPB has funded a guide to underwriting for NPR stations which stresses the need for public radio stations to market themselves aggressively to prospective corporate underwriters. (ASCAP Exh. 312.) In selling on-air corporate underwriting spots, NPR has a development department which provides prospective underwriters with a package of information describing the public radio audience and its commercially desirable demographics such as disposable income and buying habits. (Tr. 2440-41 (Jablow).) In addition, NPR has bartered corporate underwriting time with national magazines in exchange for advertisements for NPR. (Tr. 2449, 2451-52 (Jablow); ASCAP Hearing Exh. 20X.) As part of the public radio Future Fund, NPR has undertaken a project to increase system-wide underwriting income by coordinating multi-market underwriting sales and by adding value to underwriting. (Tr. 2411-12 (Jablow).) In addition, numerous public radio stations have undertaken their own corporate underwriting campaigns. (See, *e.g.*, ASCAP Exh. 615.9, 615.37, 615.58, 615.68, 615.79, 615.100, 615.106 as part of ASCAP Hearing Exh. 24X.)

106. Public radio is also increasingly seeking to raise "entrepreneurial revenue," by, for example, leasing studios and selling merchandise through retail catalogues. (Ledbetter D.T. 43-45; Unmacht D.T. 15-16.)

**V. BMI'S METHODOLOGY FOR CALCULATING PUBLIC BROADCASTING FEES ON THE BASIS OF COMMERCIAL FEES**

107. ASCAP agrees with BMI's general approach, that the subsidy-free rate should be set by looking at fees paid by the commercial broadcasters, who do not have section 118 licenses (Boyle D.T. 4), and ASCAP examined two of the four factors examined by BMI in making its comparison: music use and revenues. (Boyle D.T. 5.) Further, the Public Broadcasters have conceded that music usage, revenues and programming expenditures are relevant factors if one were to compare public and commercial broadcasting. (Tr. 2756, 2760-2763 (Jaffe).)

108. Set forth below is BMI's analysis of the fair value, subsidy-free music licensing fee for public broadcasting on the basis of a comparison between commercial and public broadcasting. The analysis proceeds in five steps: (A) identifying the fees negotiated between BMI and the commercial television and radio industries; (B) describing the four factors of music use, programming expenditures, audience size and revenues that figure in BMI's analysis; (C) analyzing public television by reference to those factors; (D) analyzing public radio by reference to those factors; and (E) calculating the fees for public television and public radio on the basis and adjustment of the commercial fees paid to BMI in light of the four factors.

**A. The Fees Negotiated between BMI and the Commercial Broadcast Industry**

109. BMI's music licensing agreements with commercial broadcast television and commercial broadcast radio are the product of bilateral negotiations between parties with roughly equal bargaining power. (Owen D.T. 3.) Each of the all-industry groups with which BMI

negotiates accounts for a large portion of total performance royalties BMI collects for its writers and publishers. (Owen D.T. 3.) BMI negotiates separately and at arm's length with ABC, CBS and NBC covering their television networks and wholly-owned stations. (Owen D.T. 3; Willms D.T. 11.)

110. Local commercial television stations are represented collectively in their negotiations with BMI by the Television Music Licensing Committee ("TMLC"), using counsel and a professional staff. (Owen D.T. 3; Willms D.T. 11-12.)

111. Commercial radio stations are represented collectively by the Radio Music Licensing Committee ("RMLC"), using counsel and a professional staff. (Owen D.T. 3; Willms D.T. 24.)

112. Agreements between BMI and the TMLC and RMLC are market transactions reached by mutual consent, rather than being imposed by a court or other outside party. (Owen D.T. 3.) BMI has a long history of negotiation with the three networks, the TMLC and the RMLC. (Willms D.T. 14, 25.) Like other market prices, the levels of these fees react over time to changing circumstances in the industries. For instance, as BMI's share of the relevant music repertoire has increased, BMI's fees have increased. (Owen D.T. 3-4.)

113. BMI expects to receive \_\_\_\_\_ in licensing fees from the commercial television broadcasting industry in 1997. (Willms D.T. 16.) This represents the sum of expected commercial television revenues from the three networks ABC, CBS, and NBC (approximately \_\_\_\_\_) and local stations \_\_\_\_\_ (Willms D.T. 16.)

114. For music performances by the three networks, BMI received \_\_\_\_\_ in license fees in 1996 as a result of negotiated blanket license agreements. (Willms D.T. 16.) This is essentially equal to what ASCAP received. (Reimer D.T. 9.)

115. The terms of the current BMI commercial local television station agreement are set forth in the letter between BMI and the TMLC dated March 19, 1997 (attached to the BMI Blanket License which is BMI Exh. 5), governing the fees for the period January 1, 1995 to March 31, 1999. (Willms D.T. 12-13.) The agreement between BMI and the TMLC calls for the net amount for the twenty-four months commencing April 1, 1997 to fall within the range of \$141,750,000 to \$151,750,000 (the use of a range is due to the unknown level of fees to be paid by certain local commercial television stations under the per program license). (Willms D.T. 13.) Accordingly, the anticipated net yield to BMI is \$73 million for the 12 months commencing April 1, 1997. (Willms D.T. 13.) The record shows that BMI's share of local commercial television music license fees went up dramatically in the 1980's and early 1990's from 58 percent to 70 percent of ASCAP's. (Willms D.T. 14-15.) BMI's share of local television license fees vis-à-vis ASCAP has continued to rise since then. This is confirmed by the fact that whereas BMI expects to receive approximately \$73 million for the 12 months commencing April 1, 1997 (Willms D.T. 13), ASCAP expects to receive "something in the order of \$70 million." (Tr. 201 (Reimer).)

116. BMI received approximately \_\_\_\_\_ in 1996 in license fees from about 10,000 commercial radio stations. (Willms D.T. 24.) BMI's blanket license rate for commercial radio stations of 1.605 percent of adjusted net revenues through 1996 is virtually identical to ASCAP's rate of 1.615 percent for the same period. (Willms D.T. 24; BMI Exh. 35 at 5.)

117. In summary, BMI received approximately \_\_\_\_\_ for commercial television \_\_\_\_\_ and radio broadcasters for a blanket license for the year 1996/1997.

**REDACTED**

**B. The Four Factors of Music Use, Programming Expenditures, Revenues and Audience**

118. As noted, BMI does not contend that the public stations should pay the same fee as the commercial stations (that is, 1. Rather, it has adjusted the commercial fees on the basis of a comparison between commercial and public broadcasting using the four relevant factors of music use, audience size, revenues and programming expenditures:

**1. Music Use**

119. It would be expected that if BMI or ASCAP music is used more (or less) intensely on public television than on commercial television, public television could be expected to have a higher (or lower) fee, other things being equal. (Owen D.T. 4-5.)

**2. Programming Expenditures**

120. Public and commercial television pay market prices for similar types of non-music programming inputs. (Owen D.T. 5; Tr. 2758, 2760 (Jaffe).) If public television and commercial television use music with similar intensity, the relationship between total programming costs and music fees in commercial television should be similar to the relationship between total programming costs and market-based music fees in public television. (Owen D.T. 5.) In addition, it would be expected that the ratio of music fees to other program expenditures would be approximately the same in commercial and public television if music fees for public broadcasters are set at market rates. (Owen D.T. 5.) This would be true even if non-music programming inputs such as scripts or acting are supplied to public broadcasting at lower prices than they are supplied to commercial broadcasting. (Owen D.T. 5.) Dr. Jaffe endorsed this measure in that he would expect music expenditures to be proportionate to other programming expenditures over time. (Tr. 2756 (Jaffe).) Accordingly, programming

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expenditures of public television that are lower (or higher) than commercial television would yield music license fees for public television that are lower (or higher) than music license fees for commercial television, other things being equal. (Owen D.T. 5.)

### 3. Revenues

121. Revenues are a rough measure of a buyer's ability to pay for a good or service (Owen D.T. 5; Tr. 2759 (Jaffe)) and are also a rough proxy for programming expenditures, which are related to the level of music fees. (Owen D.T. 5; Tr. 2760-2763 (Jaffe).) Revenues would also be considered by the parties in a negotiation setting. (Tr. 2761, 2763 (Jaffe).) Accordingly, if public television has lower (or higher) revenues than commercial television, the public television fee would be expected to be lower (or higher), other things being equal. (Owen D.T. 5.)

122. Dr. Owen and Dr. Jaffe agreed with each other that there is no reason to distinguish between public and private sources of revenue in considering the Public Broadcasters' revenues as a basis for fee setting in this proceeding. (Tr. 1507-08 (Owen); Tr. 2942-2943 (Jaffe).) Dr. Jaffe testified as follows:

"JUDGE GULIN: How about the distinction that there's more of a relationship between programming and private revenues than there is between public revenues?

"THE WITNESS [Dr. Jaffe]: I don't believe that's true. I mean I think that in the aggregate, the broadcasters on both the TV and the radio side are putting together budgets for program expenditures and I don't think it's true that revenues, the private revenues are somehow more directly connected - I mean, it is true that the private revenues, a large component of that is underwriting and also memberships, but it is also true that they form only a fraction of the money that ultimately is available for programming. I mean they couldn't spend \$800 million creating programs if all they had were the private resources. They just don't add up and so it doesn't

- I don't really see how for the purpose is of producing programs you would want to exclude the federal monies."

(Tr. 2942-2943 (Jaffe).) (See also Jaffe R.T. 34 n.14 ("If revenue is to be used as a benchmark, the appropriate total is all revenue, both public and private.)) While ASCAP excluded tax-based revenues formally from its fee proposal, Dr. Boyle testified that he did this only to be conservative and that a good argument existed for including all public broadcasting revenues. (Boyle D.T. 7.)

#### 4. Audience Size

123. The purpose of programming in broadcast television is to entertain and inform an audience, either as an end in itself or as a means to sell audience to advertisers or corporate underwriters. (Owen D.T. 6.) If public television has a smaller (or larger) audience than commercial television, one would expect public television to have a smaller (or larger) fee, other things being equal. (Owen D.T. 6; Tr. 2766-2767 (Jaffe).)

124. In this regard, it is significant that, over the last twenty years, the Public Broadcasters have compared themselves to commercial television by reference to audience size with respect to the precise issue of determining music licensing fees. The evidence shows that the Public Broadcasters made such a comparison both in the last CRT proceeding in 1978 involving ASCAP, and in negotiations with BMI in 1992. In the 1978 proceeding, Professor Baumol, the Public Broadcasters' expert economist, proposed that ASCAP's licensing fee could be set on a basis of a comparison between the audience size of public broadcasting with that of the commercial broadcasters. (Public Broadcasting Rate Proceedings before the Copyright Royalty Tribunal, March 14, 1978 at V-51 (testimony of William Baumol), incorporated by reference herein by the Public Broadcasters; see also Tr. 2770 (Jaffe) (Dr. Baumol is "a very well

respected economist.".) Moreover, in the 1992 negotiations between BMI and the Public Broadcasters Ms. Jameson admitted that, in considering what their BMI fee should be, the Public Broadcasters themselves compared the relative sizes of the audience of commercial and public television. (Public Broadcasters Hearing Exh. 30X at 4.)

C. BMI's Analysis of Public Television

1. Music Use

a. BMI's Music Use Studies

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REDACTED

129. The Public Broadcasters introduced no evidence with respect to music use on commercial television. While ASCAP submitted a study showing relative ASCAP music usage on commercial and public television, it submitted no data on relative total music usage.

b. BMI's Music Use Data Shows That The Amount Of BMI Music Used Per Hour In Public And Commercial Broadcast Television Is Similar

i. Public Television

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John Wilson, senior director of program scheduling and editorial management in the PBS programming department, testified previously that non-program material accounted for an average of 5.6 minutes per hour on public television broadcasts. (Owen D.T. 6, citing Direct Testimony of John Wilson before the Copyright Arbitration Royalty Panel, Docket No. 96-3 CARP SRA at 23, incorporated by reference herein by BMI.)

REDACTED

ii. Commercial Television

REDACTED

iv. Conclusion as to Music Usage Adjustment for Television

135. Accordingly, no adjustment for music use to the commercial fee benchmark would be warranted as public television uses BMI music about the same as commercial broadcast television. (Owen D.T. 9.) The Public Broadcasters offered no evidence to suggest that this relationship will not be similar in the years 1998-2002.

c. The Commercial Fee Level Indicator Need Not Be Adjusted Based On The Public Broadcasters' Music Use Study

136. The Public Broadcasters also conducted a durational study of music used on public television for each year from 1992 to 1996. No adjustment in BMI's conclusion with respect to music use is required based on the Public Broadcasters' data, as those results are about the same as those based on BMI data. (See Tr. 29 ("BMI's [music use] data, overall, is fundamentally, fundamentally in line with our own") (Public Broadcasters' Opening Statement).)

137. The Public Broadcasters estimated that in 1995, approximately of music were used in an average broadcast hour on public television stations. (Jaffe D.T. (Data Underlying Figures 5 and 6 (Corrected)).) Like BMI's analysis, this figure captured *only* music used during the programs, and not interstitial music. (See Jaffe D.T. 16-17.) Accordingly, according to the Public Broadcasters, music was used during approximately of program time in 1992 and 1995 on public television.

138. Based on the Public Broadcasters' data, BMI accounted for about of all copyrighted music used on public television between 1992 and 1996. (Owen R.T. 3.)

139. Accordingly, under the Public Broadcasters' music use data, BMI music was used during percent of program time on public television.

consequently no adjustment for music use to the commercial fee level indicator would be warranted even if the Public Broadcasters' data were relied upon instead of BMI's music use data.

## 2. Programming Expenditures

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140. Testimony of John Wilson of PBS incorporated herein states that total programming expenditures by public television at all levels in fiscal year 1995 were about \$674 million. (Owen D.T. 9, citing Direct Testimony of John Wilson before the Copyright Arbitration Royalty Panel, Docket No. 96-3 CARP SRA, at 41, incorporated by reference herein by BMI.) The Public Broadcasters also relied on the same figure. (Public Broadcasters Exh. 6.)

141. An average of the programming expenditure levels for commercial television in 1994 and 1995, based on data from Paul Kagan Associates, Inc. and Bear Stearns & Co. yields \$10.102 billion per year. (Owen D.T. 10.) These are sources relied on in the industry. (Owen D.T. 9.) Neither the Public Broadcasters nor ASCAP presented evidence disputing this figure.

142. Accordingly, it is undisputed that public television programming expenditures were 6.7 percent of the level of commercial television programming expenditures. (Owen D.T. 11.) The Public Broadcasters offered no evidence to suggest that their share of programming expenditures would decline relative to the commercial television broadcasters in the years 1998-2002. If anything, the Public Broadcasters could be expected to be spending more in the next five years, based on PBS's plan to increase its programming expenditures by 50 percent by 2000. (ASCAP Hearing Exh. 14X at 11.)

### 3. Revenues

143. The total revenues of public television were \$1.460 billion in fiscal year 1995 (BMI Exh. 43; Public Broadcasters Exh. 4), and \$1.383 billion in fiscal year 1994. (BMI Exh. 44; Public Broadcasters Exh. 4.)

144. BMI took an average of commercial broadcast television revenues in 1993-1994 and 1994-1995 based on data from Paul Kagan Associates, Inc. and McCann-Erickson. (Owen D.T. 11-12.) The average ranged from \$29.093 billion to \$31.927 billion per year. (Owen D.T. 11.) The Public Broadcasters did not offer evidence disputing these commercial television revenue figures.

145. Accordingly, public television revenues were approximately 4.6 to 4.8 percent of commercial broadcast television revenues in 1994 and 1995. (Owen D.T. 12.) The Public Broadcasters offered no evidence to suggest that their share of television revenues would decline relative to the commercial television broadcasters' in the years 1998-2002.

### 4. Audience Size

146. Based on data provided by Paul Kagan Associates, Nielsen Media Research and the National Cable Television Association, the public television audience in the past three years has been approximately 4.4 to 5.5 percent as large as the audience for commercial broadcast television. (Owen D.T. 12.) Neither the Public Broadcasters nor ASCAP introduced evidence disputing these facts. PBS's Annual Report for 1997 states that public television is holding "firm and steady" in audience share whereas commercial broadcasters are losing audience share to cable television. (ASCAP Hearing Exh. 14X at 4.) There is no reason to believe that the public television stations will lose audience share relative to commercial television stations in the years 1998-2002.

**5. Public Television Is Approximately 4 to 7 Percent As Large As Commercial Television**

147. No adjustment appears necessary for differences in use of BMI music, as such usage appears quite comparable on public and commercial television. (See ¶¶ 125-139, above.) Based on the factors of revenue, expenditures, and audience size, public television is about 4 to 7 percent of the size of commercial television. (Owen D.T. 13.)

**D. BMI's Analysis Of Public Radio<sup>11</sup>**

**1. Music Use**

148. No party to this proceeding submitted overall music use data with respect to radio. (Tr. 2847 (Jaffe).) ASCAP submitted data only on its own music usage on radio. Programming formats, however, can be used as a proxy for music use data. This was done by BMI and the Public Broadcasters. (See Smith D.T. 4; Owen D.T. 7-8, Tr. 2621-22 (Jaffe).)

149. CPB reported that 36 percent of public radio hours broadcast are news and information or other non-music format programming. (Owen D.T. 13, citing BMI Exh. 6.) NPR confirmed that 33 percent of public radio hours were news and information and spoken word/entertainment based formats. (Jablow D.T. 7.) An additional 33 percent of public radio hours broadcast consist of programs using a classical music format. (Owen D.T. 14, citing BMI Exh. 6; Jablow D.T. 7-8.)

150. Although data are not available to permit a reliable estimate of public radio's use of BMI music relative to commercial radio's use, it is possible to put a reasonable lower bound

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<sup>11</sup>. Data were not available to enable a comparison to be made between the programming expenditures of public radio and those of commercial radio. (Owen D.T. 13-14.)

on relative use by making several conservative assumptions. (Owen D.T. 14.) If it is assumed that (1) public radio "non-music" format and classical music format programming (which uses much public domain music) makes absolutely no use of BMI music at all, (2) commercial radio carries no "non-music" format programming and no public domain classical music programming, and (3) BMI's share of other public radio music programming is equal to its share of music on commercial radio, then public radio could be expected to use at least one-third as much BMI music as commercial radio. (Owen D.T. 14.) These are conservative estimates as news and information programming on public radio plainly carries BMI music as theme and interstitial material (ASCAP Exhs. 320, 321; Tr. 2524-25 (Jablow)), BMI music is broadcast in classical programs on public stations (Willms D.T. 26; Smith D.T. 14-16), and commercial radio obviously includes a substantial amount of all-news, all-talk, and sports format programming, as well as some public domain classical music. (Owen D.T. 13-14.)

## **2. Revenues**

151. Total revenues for public radio at all levels in fiscal year 1994 were \$411 million (BMI Exh. 44), and in fiscal year 1995 were approximately \$457 million. (See BMI Exh. 50; Owen D.T. 15 n. 39; Public Broadcasters Exh. 4.)

152. BMI calculated an average of commercial radio revenues in 1993-1994 and 1994-1995, respectively, based on data from Paul Kagan Associates, Inc. and McCann-Erickson, and arrived at a figure of over \$10 billion. (Owen D.T. 15.) The Public Broadcasters do not dispute BMI's estimate.

153. Accordingly, it can be concluded that public radio revenues were 4.1 to 4.2 percent of commercial radio revenues. (Owen D.T. 15.) There is no reason to believe that public radio's share of revenues relative to commercial radio will decline in the years 1998-2002.

### 3. Audience Size

154. Based on data provided by CPB and the Radio Advertising Bureau, public radio listening is conservatively estimated to be 3.4 percent of commercial radio listening hours. (Owen D.T. 16.) Neither the Public Broadcasters nor ASCAP dispute this. There is no reason to believe that public radio's share of the radio audience will decline in the years 1998-2002.

### 4. Public Radio Is Approximately 3 To 4 Percent As Large As Commercial Radio

155. The revenue and audience size of public radio are approximately 3 to 4 percent of commercial radio. (Owen D.T. 16.) Using a lower-end estimate that public radio's use of BMI music is one-third the level in commercial radio, a market transaction setting licensing fees BMI receives from public radio is estimated to be in the range of one to two percent of the fees paid by commercial radio. (Owen D.T. 16.)

### E. Public Broadcasting Music Fees Can Be Appropriately Estimated Based On Commercial Broadcasting Music Fees

#### 1. Public Television

156. BMI expects to have received approximately **REDACTED** in music licensing fees from the commercial television broadcasting industry in 1997. (Willms D.T. 16.) A fee 4 to 7 percent this size, or approximately \$4 to \$7 million, approximates the annual fee that BMI and the Public Broadcasters would negotiate in a market transaction covering television alone. (Owen D.T. 16-17.) The mid-point of this range, \$5.5 million per year, is a reasonable fee for the public television stations to pay BMI for the years 1998-2002.

#### 2. Public Radio

157. BMI received approximately **REDACTED** from the commercial radio industry in 1996 and anticipates that it will have received somewhat more in 1997. (Willms D.T. 24.) A

market transaction covering public radio alone, would approximate a fee 1 to 2 percent this size, or approximately \$1 million to \$2 million. BMI's license fee proposal of \$1.395 million per year is reasonable for the public radio stations to pay BMI for the years 1998-2002.<sup>12</sup>

**F. At a Minimum, BMI Should Receive No Less Than 42.5 Percent Of The Combined BMI And ASCAP Fees Or 74 Percent Of ASCAP's Fee**

158. BMI should receive no less than 42.5 percent of the combined BMI and ASCAP fees awarded in this proceeding, or, stated another way, no less than 74 percent of the fees awarded to ASCAP alone.<sup>13</sup> The undisputed evidence with respect to public television music usage indicates that BMI has a 42.5 percent share of the total amount of BMI and ASCAP music used on public television, whether based (i) on BMI's comprehensive music use study (38.6 percent in 1996, adjusted upward to account for the removal of SESAC share and public domain

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12. BMI calculates a fee of \$1.395 million by a methodology that begins with the commercial fees for radio of \_\_\_\_\_ for 1996, and adjusting them to take into account the differences between commercial and public radio. First, a fee of \_\_\_\_\_ is about 1 percent of total industry revenues of commercial radio (over \$10 billion). Second, the application of this 1 percent share to public radio's revenues of \$457 million would yield fees of about \$4.5 million. Third, BMI adjusts this fee of \$4.5 million to take into account differences in music use. Specifically, BMI conservatively discounts all the music in news/talk formats on public radio (36 percent of broadcast hours) and all the music in classical music formats (33 percent of broadcast hours). BMI relies on the remaining 31 percent broadcast hours that use music formats which would be the sources of most of the BMI music. Thus, BMI proposes a fee based upon approximately 31 percent of the \$4.5 million, or \$1.395 million. (Willms D.T. 24-26; Owen D.T. 13-17.)
13. A request for no less than 42.5 percent of the combined BMI and ASCAP fees is identical, mathematically, to a request for no less than 74 percent of the fees awarded to ASCAP alone.

share) or (ii) the Public Broadcasters' music data (an average of 42.5 percent over the five-year period 1992-1996).<sup>14</sup> The result of the Public Broadcasters' data are set forth below:

	1992	1993	1994	1995	1996
BMI SHARE	45.3%	40.5%	45.5%	42.9%	38.5%

BMI's Average Share Over Five-Year Period 1992-1996: 42.5%

(BMI Hearing Exh. 4.)

159. It is proper to rely on the average of its music share over the period 1992-1996, rather than taking a single year of 1996 in isolation, because it is more appropriate to look at a party's average music share, rather than to focus on a single year in order to avoid the "sizable year-to-year variances which could potentially skew the computation, particularly if the base year against which changes are measured is statistically aberrational." *United States v. ASCAP (In re Applications of Capital Cities/ABC, Inc. and CBS, Inc.)*, 831 F. Supp. 137, 164 (S.D.N.Y. 1993).

160. In the absence of any evidence as to the respective shares of the actual music shares of BMI and ASCAP on public radio, it is reasonable to use the public television music use shares as a proxy for public radio for setting the relationship between BMI and ASCAP fees because the negotiators for the Public Broadcasters, BMI and ASCAP have historically done exactly this. (Tr. 2660, 2666 (Jameson); Berenson R.T. 3.)

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14. BMI cites the Public Broadcasters' data with respect to the issue of its share of music relative to ASCAP because these data exclude all SESAC and public domain music – leaving only BMI's share relative to ASCAP. BMI's music data, however, only provides information as to BMI's share of total music and, therefore, includes SESAC and public domain.

## VI. THE PUBLIC BROADCASTERS' ATTACKS ON BMI'S METHODOLOGY FAIL

161. The Public Broadcasters do not deny that commercial broadcasting could be a potential benchmark for setting fees in this case. Specifically, Dr. Jaffe acknowledged in this proceeding that, if there were no prior agreement to look to, he would "try to find contexts that . . . were from an economic standpoint comparable" and that he "might well look at commercial broadcasting as one potential benchmark." (Tr. 2773-74 (Jaffe).)

162. Moreover, in conducting their business affairs, the Public Broadcasters have regularly compared themselves to commercial broadcasters, including when they have dealt with the issue of music licensing fees.

163. In the 1992 license negotiations with BMI, Paula A. Jameson of PBS specifically compared public television to the commercial networks in terms of their audience sizes. PBS's minutes of a negotiating meeting with BMI of July 9, 1992 – which Ms. Jameson confirmed accurately reflected her statements at the meeting – record Ms. Jameson as stating to BMI: "In preparing for these negotiations we looked at *benchmarks* we considered an appropriate basis for these royalty fees. We looked at the ratio of *network* fees to audience and compared it to our [PBS] audience." (Public Broadcasters Hearing Exh. 30X at 4 (emphasis added); Tr. 3602 (Jameson).)

164. Comparing public television to commercial television in terms of relative audience size for purposes of setting the music license fees was also advocated and relied upon by the Public Broadcasters in the 1978 ASCAP CRT proceeding. Professor Baumol, Public Broadcasters' economic expert in that proceeding, testified:

"The magnitude of the service provided by the broadcasting industry is dependent on the size of the audience – the number of persons served. . . .

"What this means is that when a piece of music is broadcast by a commercial network, with its enormous audience a far greater quantity of product is generated than when a similar piece is transmitted by public broadcasters, with its far smaller audience."

(1978 Noncommercial Educational Broadcasting Rate Adjustment Proceeding, Testimony of William Baumol, V-51). PBS's general counsel at the time, Eric Smith, stated the same. (1978 Noncommercial Educational Broadcasting Rate Adjustment Proceeding, Testimony of Eric Smith VI-8.)

165. In the Satellite Carrier Rate Adjustment Proceeding before a CARP last year, the Public Broadcasters likewise took the position that the fair market value of the programming that PBS distributed which was retransmitted on satellites to home receivers, and which contained BMI and ASCAP copyrighted music, was equal to, if not greater than, the value of the programming broadcast on the three commercial networks – ABC, CBS, and NBC – and PBS, therefore, sought equality of treatment to the commercial broadcasters. Direct testimony of Linda McLaughlin, *In the Matter of 1996 Satellite Carrier Rate Adjustment Proceeding*, Dkt. No. 96-3 CARP NCBRA at 3-4, Table 1, incorporated by reference herein by BMI.) Notably, in that proceeding, the Public Broadcasters did *not* take the position that, because of differences between public and commercial broadcasting, the programming of the Public Broadcasters (including its musical component) was worth less, on a dollars-and-cents basis, than commercial programming. (*Id.*)

166. The Public Broadcasters have also compared themselves to commercial broadcasters in their own literature. For instance, in its 1997 Annual Report, PBS touted its success in relation to commercial broadcasters, stating:

"In a year when the commercial broadcast networks continued to experience erosion of their audience share to niche programmers on cable, PBS's prime-time viewership held firm and steady; . . .

"In a ruthlessly competitive media marketplace, where commercial programmers struggle to define a distinctive brand identity . . . we are finding it possible to succeed by reaching out to every audience segment and extending our creativity into new services and new media."

(ASCAP Hearing Exh. 14X at 4.)

167. PBS has also compared its programs with the commercial networks, saying it has "garnered more Peabody Awards and children's Daytime Emmys than NBC, CBS, ABC and Fox combined." (ASCAP Hearing Exh. 14X at 4-5.)

168. Moreover, as the Public Broadcasters have been aware, commercial broadcasters have compared themselves to the Public Broadcasters. Thus, during the 1992 negotiations, BMI informed the Public Broadcasters that BMI had received complaints from commercial broadcasters that the Public Broadcasters' music license fees were disproportionately low relative to the music license fees paid by them, especially in the context where the programming on both public and commercial stations was beginning to converge. (Berenson R.T. 2; see also Tr. 2655-56 (Jameson).) BMI also pointed out to the Public Broadcasters in those negotiations that BMI had received complaints from the commercial television and radio broadcasters about the growing amount of advertising on public television and radio. (Berenson R.T. 2.) The Public Broadcasters responded that although PBS had some control over corporate underwriting on the PBS network, it did not have complete control over the local public television member stations.

(Berenson R.T. 2.) The Public Broadcasters conceded that many of the local stations were very close to the line of what was permitted in the way of corporate underwriting on public television, and that some had even crossed that line and had been so advised. (Berenson R.T. 2; see also Tr. 2657-58 (Jameson).)

169. Although the Public Broadcasters have repeatedly compared themselves to the commercial broadcasters in their normal day-to-day business operations, they nonetheless take the position that the Panel should completely ignore the fees paid by commercial broadcasters for the identical music license at issue in this proceeding and focus *solely* on the prior voluntary agreements between BMI and the Public Broadcasters. They offer two reasons in support of this argument. First, they claim that there are substantial differences between commercial and public broadcasting such that commercial fees cannot be used as a proxy for public broadcasting fees. Second, they assert that the prior agreements are of such decisive significance that the Panel should not even look at commercial fees at all – not even as a check on whether the prior agreements constitute valid benchmarks. They are wrong on both counts.

170. To the extent that the Public Broadcasters assert that there are differences between public broadcasting and commercial broadcasting, the differences they point to are immaterial to the issue before the Panel.

171. The Public Broadcasters assert that "the objectives of Public Broadcasters are different and more complicated than the profit motive of commercial broadcasters." (Jaffe R.T. 14.) Thus, according to Dr. Jaffe, commercial broadcasters seek to maximize audience size in order to maximize profits, whereas the Public Broadcasters seek to advance the mission of public broadcasting. (Jaffe R.T. 15-17.) Specifically, the Public Broadcasters assert that "decisions to engage in programming which does or does not contain music may be based on a perceived 'fit'

between the program and public broadcasting's mission, rather than the belief that the program will generate significant audience share." (Jaffe R.T. 16.) This assertion is belied by the testimony of the Public Broadcasters' own witnesses, which indicates that decisions about programming are made by the Public Broadcasters with the size of potential audience in mind. (Tr. 2109 (Downey).) Indeed, in discussing public television stations' programming during pledge weeks, Mr. Downey stated:

"Well, we try to put on special - you know, what I'll call special programs that attract a high degree of attention that may involve, you know, celebrities or, you know, well known performers that, you know, you might not see at some other time of the year, and a good proportion of those turn out to be music programs."

(Tr. 2112-13 (Downey).) This was confirmed by Mr. Day who testified that public television airs programs that are geared towards elderly audiences who are more likely and able to contribute money to the stations. (Tr. 1061-62 (Day).)

172. The mere fact that different consumers of a good or service might have different objectives does not itself affect the price at which they can purchase that good or service in a competitive market. For example, whereas a cab driver may use his car to earn money and another person may use his car to do charity work, the fact that they have different objectives in driving their cars will not in itself affect the price they pay for gasoline. While it is true that a particular gas station might choose to give the charity-worker a discount because of his altruism, that is the gas station's own choice. In this case, while the Public Broadcasters may receive subsidies from numerous sources (government subsidies, private donations), and while such subsidies are perfectly appropriate, it is also clear that copyright owners should not – and cannot – be compelled to subsidize public broadcasting.

173. Thus, even granting that public broadcasting and commercial broadcasting might use music in programming to advance different objectives – public broadcasting to advance its mission and commercial broadcasting to maximize profits – these different objectives should not in and of themselves affect the price public broadcasting and commercial broadcasting pay for music.

174. In any case, to the extent the Public Broadcasters and the commercial broadcasters differ, BMI's fee-setting methodology takes this into account. For example, to the extent that the Public Broadcasters, in seeking to advance their mission, do not seek to maximize audience size (by transmitting programming that is of narrow interest), do not hire the most expensive actors, or do not seek to maximize revenues, these facts are reflected in the fact that its audience size, programming expenditures and revenues are lower than those of their commercial counterparts. BMI's methodology takes this into account by adjusting commercial fees proportionately.

**VII. THE PRIOR NEGOTIATED LICENSE FEES BETWEEN BMI AND ASCAP AND THE PUBLIC BROADCASTERS DO NOT REPRESENT THE APPROPRIATE BENCHMARKS FOR DETERMINING THE FAIR MARKET VALUE OF THE LICENSE FEES FOR 1998 THROUGH 2002**

175. In connection with his analysis for the purposes of determining a subsidy-free rate for BMI's music license, BMI's expert economist Dr. Owen also examined the prior agreements between BMI and the public broadcasters to determine whether they would be reliable benchmarks for this purpose. Dr. Owen concluded that they were not reliable benchmarks, because "the circumstances surrounding the 1992 negotiations made that negotiation difficult to compare to current conditions." (Tr. 1443 (Owen).)

176. Dr. Owen also explained that looking at the past is not necessarily the best measure of current market price in other contexts: "if you were trying to figure out the value of

your house would it be more accurate to look at comparable houses in which there were recent transactions or to look to the value that your house had or the price at which it sold some number of years in the past. All the information is useful and you shouldn't ignore any of it, *but, generally, at least in the real estate market, current comparative data are what gets used to come up with estimates of what a market price would be.*" (Tr. 1543 (Owen) (emphasis added).)

177. In this regard, BMI witnesses Willms and Berenson explained the conditions surrounding the prior negotiations with the Public Broadcasters that led BMI to enter into those license agreements, and the reason why those prior agreements should not be used as a benchmark for the purposes of setting current rates. (Willms D.T. 27-29; Berenson R.T. 4-10.)

**A. The Non-Disclosure Provision In The Prior Agreements**

178. One reason why the prior BMI fees do not form reliable benchmarks for setting current rates is that each of the prior BMI agreements for the periods 1983-1987, 1988-1992, and 1993-1997 contained a strict non-disclosure provision providing that the license fee to be paid to BMI by the Public Broadcasters was to be kept permanently confidential and could not be disclosed, even to the CRT in any subsequent proceeding. (Berenson R.T. 4; see Tr. 2642 (Jameson).) The non-disclosure provision states in relevant part:

"Except in response to lawful process of any legislative body or court, this writing shall be kept strictly confidential by the Parties, and its terms shall not be voluntarily revealed to any person, organization, or governmental or judicial body *including, but not limited to, the Copyright Royalty Tribunal*; nor shall it be shown, nor its terms be disclosed, to any person who has no business or legal need to know the terms."

(Public Broadcasters Exh. 14-16 (emphasis added).) Ms. Jameson acknowledged that this non-disclosure provision was insisted upon by BMI during the 1992 negotiations. (Tr. 2639, 2642 (Jameson); Berenson R.T. 4.) BMI's chief negotiator Mr. Berenson indicated that the non-

disclosure provision evidenced the parties' intent not to have the prior fees used in any subsequent rate-setting proceedings. (Tr. 3392 (Berenson).)

179. BMI waived the non-disclosure provision in the prior agreements for the purposes of this proceeding.<sup>15</sup> However, even though the Panel has access to the fees BMI agreed to in the past, the fact that at the time it entered into the prior agreements BMI insisted that the fees should not be disclosed to the CARP is of clear relevance. Specifically, BMI's insistence that the prior fees should not be disclosed to a subsequent CRT or CARP for any future rate setting is strong evidence that BMI did not believe that those fees reflected fair market value. In this regard, the agreements were clearly intended to be non-precedential.

180. Similarly, while the ASCAP agreements with the Public Broadcasters do not contain a non-disclosure clause, the 1982, 1987 and 1992 ASCAP licenses do contain non-precedential language as follows:

"SOCIETY [*i.e.*, ASCAP] and LICENSEES [*i.e.*, the public broadcasting stations being licensed] agree that said license fee will have no precedential value in any future negotiation,

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15. A few weeks prior to October 1, 1997, the deadline for the submission of direct cases in this proceeding, the Public Broadcasters requested that BMI waive the non-disclosure provision in the prior agreements, to permit the Public Broadcasters to adduce evidence in this proceeding of the prior compulsory license fees agreed to between BMI and the Public Broadcasters. (Berenson R.T. 5; Willms D.T. 29; Jameson D.T. 6 n.4; Tr. 2643 (Jameson).) The Public Broadcasters stated that, unless BMI gave this permission, the Public Broadcasters would not permit BMI to put in evidence music use data received from PBS upon which BMI had based its calculation of its music use share on public television. (Berenson R.T. 5; Tr. 2645-47 (Jameson).) In these circumstances, BMI believed it had no choice but to waive the non-disclosure provision. (Berenson R.T. 5.) In return for BMI's waiver, the Public Broadcasters permitted BMI to submit as evidence in this proceeding certain music use data. (Berenson R.T. 5.) BMI's decision in 1997 to waive the non-disclosure provision was not something it anticipated doing in 1992 when it agreed to a fee of \$785,000. (Berenson R.T. 5.)

proceeding before the Copyright Royalty Tribunal, court proceeding, or other proceeding between the parties."

(Public Broadcasters Exhs. 11, 12, 13; David R.T. 5, 7.) If this non-precedential language had not been included, ASCAP would not have agreed to the other terms of the license and would have sought higher blanket license fees. (David R.T. 5.)

181. The Public Broadcasters have not introduced any evidence that the non-disclosure provisions in BMI's prior agreements were not bargained for and material.

182. Indeed, the Public Broadcasters insisted on not disclosing in this proceeding their recently-concluded agreement with SESAC, because it contains a non-disclosure provision barring disclosure to third persons, including the CARP. (Tr. 3022-23.)

**B. The Reasons Why The Prior Agreements Between BMI and The Public Broadcasters Do Not Reflect Fair Market Value**

183. Even if BMI's prior agreement in 1992 did not contain a non-disclosure provision which effectively prevented its use in this proceeding, the circumstances surrounding the negotiations between BMI and the Public Broadcasters in 1992 were such that it is clear that the fees in the prior agreements cannot be relied upon as reflecting the fair market value of blanket licenses to use BMI music.

184. The only option for BMI if it had decided not to accept the rates proposed by the Public Broadcasters in 1992 was to commence a CRT proceeding. (Berenson R.T. 5.) For the reasons discussed below, even though BMI believed that the prior agreements did not reflect the value to the Public Broadcasters of blanket licenses to use the music in the BMI repertoire, BMI reasonably decided, as an exercise of business judgment, that it was not in its best interests to commence CRT proceedings at that time. (Berenson R.T. 6.)

1. Other Litigation Involving BMI and ASCAP Was Very Costly and Demanded an Extensive Time-Commitment from BMI and ASCAP Management

185. The negotiations over the 1992 agreement with the Public Broadcasters were conducted against a background where BMI and ASCAP were then, and had been for many years, involved in numerous costly lawsuits with other music users. (Berenson R.T. 6; David R.T. 8-9.) In 1969, CBS commenced a twelve year antitrust action against BMI and ASCAP, which was ultimately unsuccessful. *CBS, Inc. v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom. Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). (Berenson R.T. 6.) While the *CBS* antitrust action was still pending, the commercial local television industry prosecuted an antitrust action against BMI and ASCAP, beginning in 1978 and continuing until 1985. (Berenson R.T. 6.) This was also unsuccessful. *Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). (Berenson R.T. 6.) The National Cable Television Association, the Disney Channel and Black Entertainment Television commenced an antitrust action against BMI in 1990, which ended in the fall of 1991 – again with a decision in BMI's favor. *Nat'l Cable Television Ass'n v. BMI*, 772 F. Supp. 614 (D.D.C. 1991). (Berenson R.T. 6.) In addition, other antitrust claims or counterclaims were brought against BMI by cable networks, most notably HBO, which lasted until 1991. (Berenson R.T. 6.) These litigations were very costly and demanded an extensive time-commitment from BMI and ASCAP management. (Berenson R.T. 6; David R.T. 8-9.)

186. In view of the fact that BMI had been involved in a great deal of litigation in the 1980s and early 1990s, a decision was made by BMI in 1991 – following the conclusion of the *HBO* and *NCTA* litigations – to avoid involvement in any significant new litigation with music users in the immediate future. (Berenson R.T. 7.) In fact, Marvin Berenson, who negotiated on

behalf of BMI in the 1992 negotiations, opened the first negotiating session of July 9, 1992 by stating in words or substance: "I would like to begin by stating BMI's desire to resolve this issue without litigation before the Copyright Royalty Tribunal (CRT)." (Public Broadcasters Hearing Exh. 30X at 1.)

**2. No Final Commercial Television Rates Were Agreed To  
Until After the Last Prior Agreement Was Concluded**

187. In the aftermath of the unsuccessful *Buffalo Broadcasting* antitrust case brought by the local stations against BMI and ASCAP, the TMLC commenced a rate court proceeding against ASCAP. (Willms D.T. 14.) In that proceeding, the TMLC sought an approximately 75 percent decrease in their fees, which had been based on the *Shenandoah* formula; ASCAP, for its part, sought a continuation of the *Shenandoah* formula with a slight upward modification. (Berenson R.T. 8-9.) No decision was reached in these rate court proceedings until 1993, and the stations paid interim fees in the meantime. See *United States v. ASCAP (In re Application of Buffalo Broad. Co.)*, 1993-1 Trade Cases ¶70,153 (S.D.N.Y. 1993). (See Public Broadcasters Hearing Exh. 3X; Berenson R.T. 8-9; Willms D.T. 14-15.) Starting in 1985 and extending to 1994, BMI's agreement with TMLC provided that BMI would be paid a fixed percentage of whatever fees the stations paid ASCAP, and would be interim only and subject to later retroactive adjustment so long as ASCAP's were interim too. Due to the commercial stations' continually increasing use of BMI music, BMI and the TMLC agreed that commencing January 1, 1987, BMI would receive 68 percent of the ASCAP blanket license fee or an interim basis which would be increased to 70 percent of the ASCAP blanket license fee on a final basis. (Willms D.T. 15.) At the time BMI reached the 1992 Agreement with the Public Broadcasters, the license fees paid by the commercial local television stations to BMI under that agreement

were interim only. This is because ASCAP was still engaged in its rate court case, with the TMLC on behalf of the local stations. (Berenson R.T. 8.)

188. The fees BMI received from the three commercial television networks were also interim at the time of the negotiations with the Public Broadcasters in 1992 because of various contingencies in those agreements. (Berenson R.T. 9.) Because of those contingencies the final rates for the networks were not known until several years later.

189. The facts that BMI's network television fees were interim and that its local commercial television fees were the subject of a rate court proceeding in which there was a wide gap between the positions of the TMLC and ASCAP as to a reasonable rate, weighed heavily against the commencement of a Copyright Royalty Tribunal proceeding in 1992. (Berenson R.T. 9.) Specifically, had BMI initiated a Copyright Royalty Tribunal proceeding in 1992 and sought to rely upon the then-interim commercial television fees, BMI thought that it was very likely that the Public Broadcasters would argue that the interim commercial fees could not be used as a basis for comparison for public television because they were uncertain. (Berenson R.T. 9.) The Public Broadcasters took precisely this position in the 1978 Copyright Royalty Tribunal proceeding with ASCAP. (Berenson R.T. 9.)

190. The appropriateness of BMI's decision not to bring a CRT proceeding in prior years on the ground that the commercial stations' fees were interim is confirmed by the recent decision of the Copyright Office rejecting reliance on interim fees as a basis to set reasonable rates in a CARP proceeding. In the recent proceeding involving the determination of reasonable rates and terms for the digital performance of sound recordings, the Register of Copyrights agreed that "it is inappropriate to rely on interim fees to determine competitive market rates."

*See In re Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, Docket No. 96-5 CARP DSTR, 63 Fed. Reg. 25394, 25404 (May 8, 1998).

191. The Public Broadcasters have noted that final fees were available for commercial radio stations in 1992 as a basis for comparison and imply that BMI could have commenced a CRT proceeding for radio alone. (Jaffe R.T. 8.) The rates for public radio were never separately negotiated, however. As the Public Broadcasters have conceded, public television was the only focus of the negotiations, as evidenced by the fact that BMI's and ASCAP's respective music shares on public television were used as a proxy for their respective music shares on both public television and radio. (Tr. 2660, 2665-66 (Jameson).) Moreover, the evidence was clear that in prior negotiations between the Public Broadcasters and BMI or ASCAP, fees for radio were virtually ignored. As one of the Public Broadcasters' witnesses stated, "in my recollection of all these negotiations, I have never seen anybody – BMI, ASCAP, or Public Broadcasting – come forward with any data with respect to radio." (Tr. 2660 (Jameson).) Indeed, for the Public Broadcasters, the allocation of separate fees between public television and public radio was "anathema." (Tr. 2661 (Jameson).) No data were discussed by either BMI or the Public Broadcasters involving music use on public radio during the course of the negotiations, and, ultimately, in the 1992 Agreement between BMI and the Public Broadcasters there was no allocation of fees as between public television and public radio. (Berenson R.T. 10.) In these circumstances, BMI did not even consider that it could argue in a Copyright Royalty Tribunal proceeding commenced at that time that the final commercial radio fees alone should be used as a basis for setting the fees of both public television and public radio. (Berenson R.T. 10.)

### 3. The Public Broadcasters' Voluntary Agreement With ASCAP

192. The fact that the Public Broadcasters and ASCAP had already reached a voluntary agreement for the period 1993 to 1997 when they reached one with BMI was an additional factor which weighed against BMI's commencement of a Copyright Royalty Tribunal proceeding in 1992. (Berenson R.T. 3, 7.) This is because the Public Broadcasters would have been likely to put in evidence the agreement they had reached with ASCAP for the same period. (Berenson R.T. 7.) Moreover, the Public Broadcasters would almost certainly have relied on PBS's data about the relative music shares of BMI and ASCAP, and would have argued that the ASCAP rate constituted a benchmark and ceiling for the rate that BMI should receive. (Berenson R.T. 7.) BMI determined that, on balance, it was not in its best interest to devote the very substantial resources required to engage in a Copyright Royalty Tribunal proceeding in circumstances where BMI believed that the rate likely to be set by the Copyright Royalty Tribunal would not exceed a small share of the fee agreed to between ASCAP and the Public Broadcasters for the same period. (Berenson R.T. 7.)

### 4. BMI's Negotiations With Other Music Users

193. Had BMI commenced a Copyright Royalty Tribunal proceeding in 1992 with the Public Broadcasters, BMI was concerned that there was a good chance that PBS's data, which supposedly showed BMI's music share to be only                      would become public. (Berenson R.T. 7.) BMI at that time did not have an extensive music use study for public television and no music use study for public radio. (Berenson R.T. 7; see Willms D.T. 29.) Specifically, the Public Broadcasters would almost certainly have argued that because the Public Broadcasters' data showed that PBS used almost                      more ASCAP music than BMI music, the

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Copyright Royalty Tribunal should set a rate for BMI approximately the rate agreed to between ASCAP and the Public Broadcasters. (Berenson R.T. 7-8.) One consideration that BMI reasonably took into account in deciding not to commence a Copyright Royalty Tribunal proceeding with respect to public broadcasting fees in 1992 was that such a proceeding, in which BMI's music share was certain to be disclosed, would have had a negative impact on BMI's negotiations with other music users. (Berenson R.T. 8.)

#### 5. Public Broadcasting Was Under Political Attack

194. For many years prior to the 1992 negotiations, public broadcasting was under political attack in Congress. (Berenson R.T. 8.) Other members of Congress were supporting the Public Broadcasters against these attacks. (Berenson R.T. 8.) As a general matter, the members of Congress who supported the Public Broadcasters were also the supporters of the interests of BMI. (Berenson R.T. 8.) BMI was concerned that if it had commenced a Copyright Royalty Tribunal proceeding at that time against the Public Broadcasters, it might alienate its supporters in Congress, who might have perceived BMI as joining the attack on public broadcasting. (Berenson R.T. 8.) ASCAP, too, was unwilling to add to the Public Broadcasters' political troubles by bringing a Copyright Royalty Tribunal proceeding. (David R.T. 8.) The Public Broadcasters acknowledged these troubles in their negotiations with BMI and used them to persuade BMI not to be aggressive. (Public Broadcasters Hearing Exh. 30X at 4-5.) Indeed, the Public Broadcasters' expert acknowledged in this proceeding that it is rational to take political costs into account in taking on a litigated fight with a governmentally-funded entity such as public broadcasting. (Tr. 2887 (Jaffe).)

### VIII. THE PUBLIC BROADCASTERS' EXCLUSIVE FOCUS ON THE PRIOR AGREEMENT IS MISPLACED

195. The Public Broadcasters have asserted that in order to set the license fees in this case, the Panel need do nothing other than look at the prior license fees between the Public Broadcasters on one hand, and BMI or ASCAP on the other, as adjusted only by changes over time in music use, revenues and programming expenditures. Their economic expert, Dr. Jaffe, admitted that the methodology he offered was not based on any economic theory: "I don't have an economic theorem I could cite that articulates that principle, but it seems to me as a benchmark, as a guide to how to think about it, that seems to me to be a sensible way to think about it as any other I can come up with." (Tr. 2756 (Jaffe).) Dr. Jaffe's approach does not allow the Panel to determine the fair market value of the licenses by taking into account a multitude of other relevant factors. (See Landes R.T. 2.)

196. Dr. Jaffe did not examine historical circumstances surrounding the parties' agreements in the past. (Tr. 2787 (Jaffe).) He also did not take into account important changes in the parties' expectations at present or how those factors are to operate during the period of the new license. (Landes R.T. 2.) Dr. Jaffe's approach overlooks key factors which were critical to ASCAP and BMI in entering into the prior agreements with the Public Broadcasters. (See, generally, Willms D.T. 27-29; Berenson R.T. 2-6.)

197. Dr. Jaffe's argument that the Panel should use the prior agreements as the decisive factor in setting fees in this proceeding rested solely on the fact that the prior agreements were voluntarily entered into. (Jaffe D.T. 7-8.)

198. Dr. Jaffe's exclusive focus on the prior agreements is flawed for three reasons. First, Dr. Jaffe's argument rests on the flawed assumption that merely because a party enters into

a voluntary agreement for the sale of a good or service, the fee agreed to *by definition* reflects the fair market value of the good or service. This assumption is flawed because, as Dr. Jaffe himself admitted, there may be circumstances which will cause a party voluntarily to enter into an agreement at less than fair market value. (Tr. 2792 (Jaffe) ("I think I gave you a clear yes as to that previously as a hypothetical possibility").) As set forth above, there is ample evidence in this proceeding that the circumstances surrounding the prior agreements with BMI are such that the fees reflected therein did not reflect fair market value of a blanket license to use BMI's music. (See ¶¶ 175-194, above.)

199. Another flaw in Dr. Jaffe's theory is the assumption that economic agents invariably act solely in their financial self-interest. (Tr. 2793 (Jaffe) (testifying about "the basic presumption that parties act in their own self-interest.") As a result, he rejected out of hand the possibility that BMI and ASCAP voluntarily gave the Public Broadcasters a subsidy in the prior agreements. Yet the evidence is clear that both BMI and ASCAP voluntarily gave the Public Broadcasters a break in the prior agreements. With respect to BMI, for example, the evidence showed that Marvin Berenson told the Public Broadcasters in the 1992 negotiations that, "I do take into consideration the special nature of public broadcasting." (Public Broadcasters Hearing Exh. 30X at 5.) Hal David testified that in the prior agreements, ASCAP deliberately gave the Public Broadcasters a discount. (Tr. 3081-82 (David).) As Mr. David testified: "I believe we made agreements with Public Broadcasters which was below market value." (Tr. 3081-82 (David).) This is because the Public Broadcasters were under attack politically "and we didn't want to add to their problems." (Tr. 3071 (David); see also Tr. 3083-84 (David).)

200. Dr. Jaffe's flawed assumption about the motives of the parties in this proceeding also infected his definition of the term "subsidy." Dr. Jaffe assumed that a subsidy is, by definition, *compelled* (Tr. 2814-2816 (Jaffe)), as if there could never be a voluntary subsidy.

201. Contrary to Dr. Jaffe's assumption, individual composers work for the Public Broadcasters for any number of non-economic reasons in addition to their performance royalties – psychic benefit, artistic merit, recognition, and public service. (Tr. 657 (Ledbetter); see, e.g., Tr. 1627-28 (Bacon).) That these composers have been willing to work for a below-market price in the past does not mean that they should be compelled to do so in the future.

202. Mr. Bacon testified that his decision whether to work for the Public Broadcasters was based upon the size of the up-front fees – which were almost the same as those of commercial broadcasting – not the size of his BMI royalties with respect to which there was a large disparity. (Tr. 1636 (Bacon).)

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In addition, he also testified that there has been a trend in the last five years toward WGBH's retaining the fifty percent publisher share of performance royalties, contrary to the former practice in which the composer was permitted to receive the publisher royalties. (Tr. 1633-34 (Bacon).)

203. The Public Broadcasters' attempt to attach decisive significance to the prior agreements is also unpersuasive because they overlook the fact that for the period 1998-2002 – the period for which license fees are at issue in this proceeding – the parties were unable to reach an agreement. If it were really true that the parties' entering into voluntary agreements in the past is a conclusive factor in determining fair market value then, the fact the parties have been unable

to reach an agreement for the present should be equally conclusive now. When questioned on this point, Dr. Jaffe had no convincing response. (Tr. 2868-69 (Jaffe).)

204. Dr. Landes, one of ASCAP's economic experts, testified as follows on this issue: "if Dr. Jaffe's methodology were correct and all ASCAP cared about were those things that he put into that testimony . . . then ASCAP should have looked at the proposal and said oh, gee, it's exactly and identically what we have always asked for in the past and what we want, and there would be no point in coming to the CARP. So . . . it's clear there is a dispute because whatever conditions existed that made it attractive to accept that proposal in previous years do not exist today." (Tr. 3372 (Landes).)

## PART II: PROPOSED CONCLUSIONS OF LAW OF BROADCAST MUSIC, INC.

205. The CARP must present "a rational analysis of its decision, setting forth specific findings of fact and conclusions of law" and is required to "articulate clearly the rationale for its award of royalties to each claimant." *In re Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25394, 25398-99 (May 8, 1998). See also *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922 (D.C. Cir. 1985), cert. denied sub nom. *Christian Broad. Network, Inc. v. Copyright Royalty Tribunal*, 475 U.S. 1035 (1986); *Christian Broad. Network, Inc. v. Copyright Royalty Tribunal*, 720 F.2d 1295 (D.C. Cir. 1983); *Nat'l Cable Television Ass'n v. Copyright Royalty Tribunal*, 689 F.2d 1077 (D.C. Cir. 1982); *Recording Indus. Ass'n of America v. Copyright Royalty Tribunal*, 662 F.2d 1 (D.C. Cir. 1981). The CARP "look[s] first to the Copyright Act and the legislative history for guidance." *1982 Adjustment of Royalty Schedule for Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting; Terms*

*and Rates of Royalty Payments*, Docket No. CRT 82-2, 47 Fed. Reg. 57923, 57924 (1982) (ASCAP Exh. 17).

**I. UNDER SECTION 118, THE CARP IS REQUIRED TO SET A FAIR MARKET VALUE, SUBSIDY-FREE RATE**

206. In determining rates under section 118 of the Copyright Act, a CARP is required to establish fair market value rates. Section 801(b)(1) directs the Panel to "make determinations as to reasonable terms and rates of royalty payments as provided in [17 U.S.C. §] 118." 17 U.S.C. § 801(b)(1) (1998). This is similar to the task the CARP faced in setting fair market value rates for satellite carriers under section 119 last year. *In re Rate Adjustment for the Satellite Carrier Compulsory License*, Docket No. 96-3 CARP SRA, 62 Fed. Reg. 55742 (Oct. 28, 1997). Section 801(b) provides that the Panel should determine "reasonable terms and rates of royalty for a Section 118 license." 17 U.S.C. § 801(b)(1).

207. An appraisal of fair market value is based essentially on an estimation of "the price that a willing buyer and a willing seller would agree to in an arms-length transaction." *United States v. ASCAP (In re Application of Showtime/The Movie Channel, Inc.)*, 912 F.2d 572 (S.D.N.Y. 1989), *aff'd*, 912 F.2d 563, 569 (2d Cir. 1990).

208. In determining rates under section 118 of the Copyright Act, a CARP is required to establish subsidy-free rates. This is clear from the legislative history. The Senate Judiciary Committee stated in its 1975 report:

" . . . The compulsory license is intended to ease public broadcasting's transition from its previous "not for profit" exemption under the existing copyright law. *As such, this provision does not constitute a subsidy of public broadcasting by the copyright proprietors since the amendment requires the payment of copyright royalties reflecting the fair value of the materials used.*"

(S. Rep. No. 94-473, at 101 (1975) (ASCAP Exh. 4 (emphasis added)); Baumgarten D.T. 11.)

The House Judiciary Committee Report reiterates this point:

"The Committee does not intend that owners of copyrighted material be required to subsidize public broadcasting."

(H.R. Rep. No. 94-1476, at 118 (1976) (ASCAP Exh. 5); Baumgarten D.T. 11.)<sup>16</sup>

209. That the standard under section 118 is fair market value is further supported by the 1982 decision of the Copyright Royalty Tribunal, which determined BMI and ASCAP rates for certain noncommercial educational radio stations unaffiliated with NPR. (Baumgarten D.T. 19-20; *1982 Adjustment of Royalty Schedule for Use of Certain Copyrighted Works in Connection with Noncommercial Broadcasting; Terms and Rates of Royalty Payments*, Docket No. CRT 82-2, 47 Fed. Reg. 250 at 57923 (1982) (ASCAP Exh. 17).)

210. In the 1982 decision, the CRT affirmed that the compulsory license rates for public broadcasting must reflect the "reasonable market value" of the copyrighted works and that Congress intended that there be no subsidy of public broadcasting by the owners of copyrighted materials. (Baumgarten D.T. 19-20; ASCAP Exh. 17 at 57924-57925.) The CRT stated:

"The Tribunal has consistently held that the Copyright Act does not contemplate the Tribunal establishing rates below the *reasonable market value* of the copyrighted works subject to a compulsory license. As we discussed in our 1978 public broadcasting opinion, we have found the congressional committee reports to be particularly useful. The House Judiciary Committee report stated that Congress 'did not intend that owners of

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16. By contrast, for example, the cable compulsory license under Section 111 of the Copyright Act does contain below-market rates that in effect subsidize cable systems to carry broadcast signals. (Willms D.T. 6-7, *citing* "A Review of Copyright Licensing Regimes Covering Retransmission of Broadcast Signals," U.S. Copyright Office, Aug. 1, 1997, at 41 (current subsidy rates should not be continued and rates should be reformed).)

copyrighted material be required to subsidize public broadcasting.' The Senate Judiciary Committee report stated that section 118 'requires the payment of copyright royalties reflecting the fair value of the materials used.'"

(ASCAP Exh. 17 at 57924-57925) (emphasis added).)

211. In addition, the Panel may look at various factors it believes are relevant in determining fair market value – it is *not* directed to look to any specific statutory objectives as CARPs are in proceedings under sections 111 and 114. (17 U.S.C. § 801(b)(1) & (2).)

## II. THE PUBLIC BROADCASTERS' RELIANCE ON BMI'S PRIOR AGREEMENTS IS INAPPROPRIATE

212. Section 118 itself expresses no particular view as to whether the Panel should look at the parties' prior voluntary agreements. 17 U.S.C. § 118(b)(3).<sup>17</sup> However, logic and

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17. 17 U.S.C. § 118(b)(3) states that "[i]n establishing . . . rates and terms the copyright arbitration royalty panel may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in paragraph (2)." (emphasis added.) Section 118(b)(2), in turn, states:

"License agreements voluntarily negotiated at any time between one or more copyright owners and one or more public broadcasting entities shall be given effect in lieu of any determination by the Librarian of Congress: *Provided*, That copies of such agreements are filed in the Copyright Office within thirty days of execution in accordance with regulations...."

(italics added).

The legislative history of section 118(b) makes clear that the prior agreements which "may" be considered are those entered into during the current five-year compulsory license period, and not those entered into prior to that period. The House Report explains that "at any time" means that the agreements may be entered into "before, during, or after determinations by the Commission." (H.R. Rep. No. 94-1476, at 118 (1976), reprinted in 1976 U.S.C.C.A.N. 5732, 5733.) This suggests that Congress referred to "voluntary" agreements in "comparable circumstances" that were negotiated around the same time as the CRT or CARP proceeding was taking place, such as the SESAC – Public

(Footnote continued on next page)

jurisprudence from the ASCAP rate court setting clearly indicates that prior agreements between the parties may be considered relevant to the fee setting in appropriate circumstances.

213. In considering the rates set forth in prior voluntary license agreements, a CARP in a section 118 proceeding should not rely on prior agreements that contain language that undermines any precedential value of the fees set forth therein. In the recent case concerning the digital performance of sound recordings, the CARP found that a prior partnership license agreement between DCR, one of the digital audio services in the proceeding, and two partner record companies, Warner Music and Sony Music (represented by the RIAA in the proceeding) was a "useful benchmark" for determining royalty fees because it provided a "useful precedent." *In re Determination of Reasonable Rates for the Digital Performance of Sound Recordings*, Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25394, 25401 (May 8, 1998). On protest of the CARP's decision to the Librarian of Congress, the RIAA opposed the use of this agreement as a benchmark on several grounds, including that the "record companies never viewed the established rate as precedential." *Id.* The Register held that "[b]ecause the partnership agreement included language that undermined any precedential value of the digital performance license included therein, the Register finds that the Panel's reliance on the DCR license fee as precedent was an arbitrary action." *Id.* at 25403, citing *Motor Vehicle Mfrs. Ass'n v. State Farm*

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Broadcasters agreement for the period 1998-2002 which was entered into shortly before this CARP was convened.

*Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983) (agency action is arbitrary where the agency offers an explanation for its decision that runs counter to the record evidence).

214. In considering the rates set forth in prior voluntary license agreements, a CARP should address challenges "to the validity of negotiated agreements as reliable benchmarks of reasonable rates at the time entered, as well as changed circumstances that may make prior benchmarks outdated measures of fair value." *United States v. ASCAP (In re Capital Cities/ABC, Inc.)*, 831 F. Supp. 137, 145 (S.D.N.Y. 1993) (ASCAP rate court case).<sup>18</sup> Thus, a CARP should not "merely endorse as appropriate for today the terms of compromises concluded yesterday." *Id.*

215. A CARP may also not use rates set forth in prior voluntary agreements as precedent if it finds that the circumstances in which the prior agreements were entered were such that those rates do not represent fair market rates. For example, in the *Showtime* case, the ASCAP rate court refused to rely on three prior agreements – between ASCAP and HBO for the periods 1980-82 and 1983-1985, and between ASCAP and Disney for the period 1983-1985 – in

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18. Because the standards governing fee-setting in the ASCAP rate court are very similar to those set by Section 118, they provide guidance to the CARP in this proceeding. The ASCAP rate court cases are clear that the task of the rate court is to "define a rate or range of rates that approximates the rates that would be set in a competitive market." *United States v. ASCAP (In re Application of Showtime/The Movie Channel, Inc.)*, 912 F.2d 572 (S.D.N.Y. 1989), *aff'd*, 912 F.2d 563, 576 (2d Cir. 1990), citing *In re Buffalo Broad. Co.*, Mem. and Order, dated February 17, 1987 at 9-11. To determine rates, the ASCAP rate court has looked to "agreements reached either by the [ ] parties [to the rate court proceeding] or by others for the purchase of comparable rights." 912 F.2d at 577; *see also United States v. ASCAP (Application of Muzak Ltd. Partnership)*, Opinion and Order, dated June 10, 1992, at 5 (Public Broadcasters' Hearing Exh. 22X); *United States v. ASCAP (Application of Turner Broad. System, Inc.)*, Mem. and Order, dated Oct. 12, 1989, at 9-14.

setting fees because the circumstances in which they were entered cast doubt on whether the fees contained therein reflected rates that would have been agreed to in actual market transactions. The court rejected the HBO-ASCAP agreement covering the 1980-82 period because it was reached at an early stage of HBO's commercial success, and specifically provided that it was "experimental" in nature. 912 F.2d at 578. The court rejected the HBO-ASCAP agreement for the 1983-85 period because it included a "most favored nations" clause under which HBO would be entitled to a reduction in its fee if ASCAP subsequently reached agreement with Showtime on a fee that was lower than the rate charged to HBO. 912 F.2d at 578. The court decided not to rely upon the prior Disney-ASCAP agreement for two reasons. First, the court found significant that Disney owned the rights to some of the music it licensed from ASCAP and it was able to recoup some the license fees it paid to ASCAP by way of royalties to its publishing house. Second, the court found significant that the prior agreement was entered into at an early stage in Disney's existence, when it was seeking to minimize substantial unplanned expenses – such as the cost of litigation in the rate court, with the attendant risk of an unfavorable outcome – such that the court could not assume that the agreed-upon rate was representative of what a market would produce. 912 F.2d at 581.

216. A CARP should not use rates set forth in a prior voluntary agreement as a precedent if it finds that the prior agreement "was very much the product of both prior negotiating history and the [parties'] understandable perception that they lacked any meaningful short-term alternative" to entering into the prior agreement. *United States v. ASCAP (In re Application of Buffalo Broad. Co.)*, 1993-1 Trade Cases ¶70,153 at 69,657 (S.D.N.Y. 1993) (rejecting continuation of *Shenandoah* formula even though there had been a multi-year history of prior agreements between ASCAP and the local television stations based on that formula).

217. A CARP should not use rates set forth in a prior voluntary agreement as a precedent if it finds that those rates were not intended to reflect a permanent arrangement. In assessing whether prior rates were intended to be permanent, a CARP may take into account the fact that the parties to an agreement choose to litigate, rather than accept its terms going forward. In the *Buffalo Broadcasting* rate case, the court rejected reliance on prior network deals as a benchmark, stating that there was "no evidence as to whether those interim agreements are likely to reflect what the parties might have agreed to on a permanent basis, but we may infer from the fact that the networks are currently litigating their fee arrangements with ASCAP that the interim agreements do not reflect the type of concurrence that can fairly be relied upon as an indicator of competitive market conditions." *Id.*

**III. THE BEST INDICATOR OF BMI'S MUSIC SHARE IS AN AVERAGE OF BMI'S MUSIC SHARES FOR EACH YEAR DURING THE PERIOD 1992 TO 1996**

218. In assessing a party's music share, it is more appropriate to look at a party's average music share over a period, rather than focus on a single year so as to avoid the "sizable year-to-year variances which could potentially skew the computation, particularly if the base year against which changes are measured is statistically aberrational." *United States v. ASCAP (In re Applications of Capital Cities/ABC, Inc. and CBS, Inc.)*, 831 F. Supp. 137, 164 (S.D.N.Y. 1993). In that case, the court arrived at a "reasonable" rate by using the fees paid by the networks under a previous agreement as a base, and adjusting to account for changes in music use. *Id.* at 164-65.

219. The average of the BMI music use share over the five-year period from 1992 to 1996 is 42.5 percent. Based on this music use share number, BMI should be awarded no less than 42.5 percent of BMI-ASCAP combined license fees or 74 percent of ASCAP's fee. In

addition, the evidence showed that BMI receives virtually the same amounts as ASCAP from commercial radio and television.

#### IV. SEPARATE FEES SHOULD BE SET FOR PUBLIC RADIO AND PUBLIC TELEVISION

220. The statutory scheme established by section 118 and logic dictate that separate license fees be set for public television stations and for public radio stations. Under the section, "any public broadcasting entities . . . may designate common agents to negotiate, agree to, pay, or receive payments." 17 U.S.C. §118(b) (1996). PBS as a party to this proceeding represents the interests of some 356 public television stations and NPR as a party to this proceeding represents the interests of some 691 public radio stations. (Downey D.T. 7 n.1; Jablow D.T. 4.) The CARP Rules make clear that in this proceeding "*each party* must state its requested rate." 37 C.F.R. §251.43(d) (1997) (emphasis supplied). PBS and NPR have each failed to state their respective rates on behalf of public television stations, on one hand, and public radio stations, on the other. Instead, PBS, NPR and CPB (which apparently does not represent any public radio or television station in this proceeding) have stated a lump sum rate for public television and public radio.

221. In addition, the schedule of rates and terms set forth in 37 C.F.R. §253.4 clearly contemplates separate rates for public television stations and separate rates for public radio stations as it sets forth such separate rates for works of composers whose works are not cleared through BMI, ASCAP or SESAC. Logic dictates that the scheme could hardly be otherwise. For example, a composer whose works are not licensed through BMI, ASCAP or SESAC and whose works appear only on radio or only on television must still be compensated. Likewise, the same is true with composers whose works are licensed through BMI, ASCAP or SESAC. If a

particular composer's works appeared only on public television or only on public radio, a distribution would have to be made only for that particular medium. Incoming license fees must be allocated between the two to ensure that composers are fully and fairly compensated as envisioned by section 118.

222. Because a CARP is required to "articulate clearly the rationale for its award of royalties to each claimant," television and radio should be treated separately because somewhat different factors bear on each. *In re Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, Docket No. 96-5 CARP DSTRA, 63 Fed. Reg. 25394, 25398 (May 8, 1998).

#### V. SEPARATE FEES SHOULD BE SET FOR BMI AND ASCAP

223. Section 118 requires that separate rates be set for each performing rights organization. An expectation of individualized rates is implicit in the requirements, originally inserted in the provision governing the Copyright Royalty Tribunal and carried over to govern the present Panel, that different groups of owners and public broadcasters "negotiate in good faith . . . in an effort to reach reasonable and expeditious results," that they "negotiate and agree upon the terms and rates of royalty payments and the proportionate division of fees among various copyright owners," and that the Tribunal (and present Panel) "proceed *on the basis of the proposals submitted to it* as well as any other relevant information." (17 U.S.C. § 118(b) (emphasis supplied)); Baumgarten D.T. 14.) Indeed, such individualized rate setting is an absolute necessity if some performing rights organizations reach agreement with the Public Broadcasters while others do not. (Baumgarten D.T. 15.)

224. That this Panel should set separate rates is also supported by the legislative history of section 118. (Baumgarten D.T. 15.) The Senate bill in the final round of revisions followed

the "single rate applicable to all owners" model similar to the jukebox compulsory license as set forth in 17 U.S.C. § 116. (Baumgarten D.T. 15.) Rates would have been set

"on a per-use, per-program, prorated or annual basis as the Copyright Royalty Tribunal finds appropriate with respect to the type of the copyrighted work and the nature of broadcast use,"

and the Copyright Royalty Tribunal would have had a royalty pool-dividing function with respect to all royalties collected comparable to that eventually provided, for example, with respect to jukebox royalties. (S. Rep. No. 94-473, at 16 (1975) (ASCAP Exh. 4); Baumgarten D.T. 15-16.)

225. Congress rejected that model, however, substituting in its place the provisions of the House Bill, which "substantially changed" the Senate's compulsory licensing terms and procedures. (H.R. Rep. No. 94-1733, at 78 (1976) (ASCAP Exh. 6).) The "substantial changes" were identified, *inter alia*, as providing for consideration of the individual proposals. *Id.* As a result of individualized royalties among the performing rights organizations, "payment of royalties under Section 118 were to be handled among the parties without governmental intervention." (*Id.*; Baumgarten D.T. 16.)

#### **VI. THE CPB SIX PERCENT FUND IS NOT A LIMITATION ON FEES THAT CAN BE PAID UNDER SECTION 118**

226. The authorizing legislation for the CPB, which limits the amount of annual appropriations that the CPB can expend on programming royalties and certain other things to six percent of that fund, in no way restricts the stations from paying for their use of music from their

own programming budgets.<sup>19</sup> The language of the statute merely restricts how much the *CPB* can expend on this and certain other specific costs, stating that:

"Of the amounts appropriated into the Fund available for allocation for any fiscal year ...

"(II) 6 percent of such amounts shall be available for expenses incurred by the Corporation for capital costs relating to telecommunications satellites, the payment of programming royalties and other fees, the costs of interconnection facilities and operations ...."

47 U.S.C. § 396 (k)(3)(A)(i)(II) (1998). Nowhere in the statute or its legislative history is it even suggested that the stations are prohibited from paying music royalty fees out of their own budgets. Indeed, when asked who would pay for these fees if the CPB seized to receive any funding from Congress, Ms. Jameson conceded that the stations would be a source of payment for these royalties. (Tr. 2698-99 (Jameson).)

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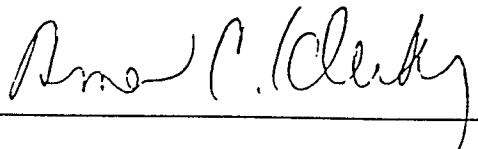
19. 47 U.S.C. § 396(k)(3)(A)(i)(II).

## CONCLUSION

BMI should be awarded its requested fees and terms from the PBS stations and the NPR stations.

Dated: May 29, 1998

Respectfully submitted,

By: 

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## APPENDIX A

### **BMI'S PROPOSED REGULATIONS CONTAINING RATES & TERMS OF COMPULSORY LICENSE FOR THE NONDRAMATIC PUBLIC PERFORMANCE OF COPYRIGHTED PUBLISHED MUSICAL COMPOSITIONS IN THE BMI REPERTORY, CODE OF REGULATIONS, PART 253**

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#### **§ 253.1      General.**

This Part 253 establishes terms and rates of royalty payments for certain activities using published nondramatic musical works and published pictorial, graphic and sculptural works during a period beginning on January 1, 1998 and ending on December 31, 2002. Upon compliance with 17 U.S.C. §118, and the terms and rates of this part, a public broadcasting entity may engage in the activities with respect to such works set forth in 17 U.S.C. §118(d).

#### **§ 253.2      Definition of public broadcasting entity.**

As used in this Part, the term "public broadcasting entity" means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in 17 U.S.C. §118(d)(2).

#### **§ 253.3      Performance of BMI musical compositions by PBS and NPR and their stations.**

(a) Scope. This section applies to the nondramatic public performance by means of over-the-air broadcasting of copyrighted published musical compositions in the repertory of Broadcast Music, Inc. (BMI) by public broadcasting entities. Such public broadcasting entities shall include all noncommercial educational televisions broadcast stations, noncommercial low power television broadcast stations, and noncommercial educational radio broadcast stations which: (i) are members of the Public Broadcasting Service (PBS) or National

Public Radio (NPR), or which receive or are eligible to receive general operational support from the Corporation for Public Broadcasting pursuant to the Public Broadcasting Act of 1967, as amended; and (ii) engage in the activities set forth in 17 U.S.C. §118(d)(1) or 17 U.S.C. §118(d)(3).

(b) Royalty Rate. (i) PBS and the television stations it represents shall pay BMI in each calendar year the sum of \$5,500,000 for the performance by PBS and the television stations it represents of the copyrighted published nondramatic musical compositions in the repertory of BMI.

(ii) NPR and the radio stations it represents shall pay BMI in each calendar year the sum of \$1,395,000 for the performance by NPR and the radio stations it represents of the copyrighted published nondramatic musical compositions in the repertory of BMI.

(c) Payment of royalty rate. The payments required by paragraph (b) shall be made in two equal payments on July 31 and December 31 of each year, except for 1998, in which a single payment shall be made within thirty days of the decision of the Librarian of Congress.

(d) Identification of stations. PBS and NPR shall annually, not later than January 31 of each calendar year, or within 30 days of the effective date of this section, whichever is earlier, furnish to BMI a complete list of all public broadcasting entities within the scope of this section, as of January 1 of that calendar year.

(e) Records of use. (i) PBS and NPR shall maintain and quarterly furnish to BMI copies of their standard cue sheets listing the nondramatic performances of musical

compositions on PBS and NPR programs during the preceding quarter (including the title, composer and author, type of use, and manner of performance thereof, in each case to the extent such information is reasonably obtainable by PBS and NPR in connection therewith).

(ii) PBS stations and NPR stations shall furnish to BMI upon the request of BMI a music-use report listing all musical compositions broadcast from or through each station, on all PBS, NPR and other programs carried by such station, showing the title, composer and author of each composition. PBS stations and NPR stations will not be obligated to furnish such reports to BMI for a period or periods which in the aggregate exceed four weeks (per station) in any one calendar year.

**§ 253.4 Notice of restrictions on use of reproductions of reproductions of transmission programs.**

Any public broadcasting entity which, pursuant to 17 U.S.C. §118, supplies a reproduction of a transmission program to governmental bodies or nonprofit institutions shall include with each copy of the reproduction a warning notice stating in substance that the reproductions may be used for a period of not more than seven days from the specified date of transmission, that the reproductions must be destroyed by the user before at the end of such period, and that a failure to fully comply with these terms shall subject the body or institution to the remedies for infringement of copyright.

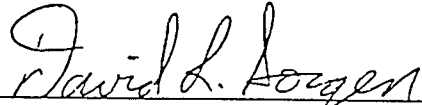
CERTIFICATE OF SERVICE

I, David L. Sorgen, an attorney, hereby certify that I caused a copy of the foregoing Proposed Findings of Fact and Conclusions of Law of Broadcast Music, Inc. in the Matter of Adjustment of Rates for Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6, before the Copyright Arbitration Royalty Panel, United States Copyright Office, Library of Congress, to be delivered by messenger on this 29th day of May on each of the parties listed on the attached service list.

Deponent is over the age of 18 and not a party to this proceeding.

I further certify under penalty of perjury that the foregoing is true and correct.

Executed on May 29, 1998.

  
\_\_\_\_\_  
David L. Sorgen

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## **APPENDIX B**

**REPLY PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW OF BROADCAST MUSIC, INC.**

**REDACTED**

CONTAINS CONFIDENTIAL  
PROTECTED MATERIALS SUBJECT  
TO THE PROTECTIVE ORDER IN  
DOCKET NO. 96-6 CARP NCBRA  
CONTAINS "ATTORNEYS' EYES  
ONLY" MATERIALS

Before the  
COPYRIGHT ARBITRATION ROYALTY PANEL  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.

Lewis Hall Griffith, Chairperson  
Edward Dreyfus, Arbitrator  
Jeffrey S. Gulin, Arbitrator

In the Matter of

ADJUSTMENT OF RATES FOR  
NONCOMMERCIAL EDUCATIONAL  
BROADCASTING COMPULSORY LICENSE

)  
) Docket No. 96-6 CARP NCBRA  
)  
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**REPLY PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW OF BROADCAST MUSIC, INC.**

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Dated: June 8, 1998

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Before the  
COPYRIGHT ARBITRATION ROYALTY PANEL  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.

Lewis Hall Griffith, Chairperson  
Edward Dreyfus, Arbitrator  
Jeffrey S. Gulin, Arbitrator

In the Matter of

ADJUSTMENT OF RATES FOR  
NONCOMMERCIAL EDUCATIONAL  
BROADCASTING COMPULSORY LICENSE

)  
) Docket No. 96-6 CARP NCBRA  
)  
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)

**REPLY PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW OF BROADCAST MUSIC, INC.**

1. Broadcast Music, Inc. ("BMI"), in accordance with the Order of the Copyright Arbitration Royalty Panel (the "Panel") dated April 6, 1998 and 37 C.F.R. § 251.52, hereby submits its reply proposed findings of fact and conclusions of law in this proceeding.

**I. THE PUBLIC BROADCASTERS' CHALLENGE TO BMI'S  
METHODOLOGY FAILS**

2. The Public Broadcasters challenge BMI's methodology of basing public broadcasting music licensing fees on those paid by commercial broadcasting by pointing to certain differences between commercial broadcasting and public broadcasting. (Public Broadcasters Findings ¶ 160.) As discussed below, all the differences to which the Public Broadcasters point in their Proposed Findings are either irrelevant to the issue before the Panel or are taken into account, and adjusted for, by BMI's methodology.

**A. Different Objectives**

3. One of the differences to which the Public Broadcasters point is that public broadcasting is said to have a different ultimate objective to that of commercial broadcasting. (Public Broadcasters Findings ¶ 161.) But as pointed out by BMI in its Proposed Findings, the fact that different purchasers of goods or services might be said to have different objectives in utilizing those goods or services does not in itself mean that they should or will pay different prices for them. (See BMI Proposed Findings ¶ 172 (noting that in market place a cab driver and a volunteer charity worker ordinarily will pay the same prices for gasoline despite their different objectives).)

4. Moreover, while, at some very high level of abstraction, the public broadcasters may have different objectives to those of the commercial broadcasters, in fact, the public broadcasters are very similar to commercial broadcasters in a fundamental sense: both seek to entertain or inform audiences by broadcasting certain audio-visual or audio programming.

5. In any case, even if public broadcasting has a different mission to commercial broadcasting in some ultimate sense, the fact is, public broadcasting uses music in its programming to advance that mission in the same way that commercial broadcasting uses the same music to advance its mission. And Congress has made clear that, even though public broadcasting may have a particular mission, section 118 does not require the creators of music to subsidize public broadcasting's efforts to advance that mission. This is not to say that public broadcasting should not be subsidized from some source, but, rather, that the Panel is not permitted to set rates requiring copyright owners to provide such subsidies.

6. Moreover, to the extent that any supposed difference between the objectives of public broadcasting and commercial broadcasting is relevant to the issue of determining music licensing fees, BMI's methodology takes this difference into account. Thus, the Public Broadcasters claim that public broadcasting differs from commercial broadcasting in that it does not seek to maximize audience size or to maximize profits. (Downey D.T. 8; Public Broadcasters Findings ¶¶ 32, 161.) But, to the extent that this means that public broadcasting attracts a smaller audience, generates smaller revenues or has smaller programming budgets than commercial broadcasting, BMI takes this into account. BMI adjusts the commercial fees in light of public broadcasting's audience size, revenues and programming expenditures.

**B. Underwriting Guidelines**

7. Another difference to which the Public Broadcasters point is that public broadcasters are subject to underwriting guidelines that do not apply to commercial broadcasters' advertising. (Public Broadcasters Findings ¶ 162.) It is clear, however, that this too is taken into account by BMI's methodology. The underwriting guidelines might bear on music licensing fees only to the extent that they affect the ability of the public broadcasters and the commercial broadcasters to raise revenues through advertising, and, therefore, affect the size of their respective revenues and respective programming expenditures. But for the purposes of setting music license fees, BMI's methodology fully accounts for this by adjusting the benchmark commercial broadcasters' fees to take into account differences in revenues and programming expenditures.

8. Moreover, it is undisputed that the underwriting rules to which the Public Broadcasters are subject have been relaxed in recent years. (BMI Findings ¶ 93.) The Public

Broadcasters themselves have long acknowledged that the relaxation of underwriting guidelines for public broadcasting could lead to increased music licensing fees. The Final Report of the Temporary Commission on Alternative Financing for Public Telecommunications dated October 1, 1983 (Public Broadcasters Exh. 12X)<sup>1</sup> warned 15 years ago that

"[c]opyright-owners' representatives have suggested they would seek higher payments from stations that broadcast advertisements and from producers whose programs are used by stations broadcasting advertisements. While the Temporary Commission is not in a position to forecast whether or how much fees might increase, it is clear that carriage of advertisements is a relevant factor to the copyright holders."

(*Id.* at 4.)

### C. Sources of Revenues

9. The Public Broadcasters also point to the fact that they have different sources of revenues than do commercial broadcasters. (Downey D.T. 10-12; Tr. 1972-73 (Downey); Public Broadcasters Findings ¶ 163.) But the fact that consumers of goods or services may have different sources of revenues does not in itself affect the price they should pay for goods or services.

10. The Public Broadcasters do not explain how the *sources* of funds -- as opposed to the *amount* of funds available to devote to acquire programming or purchase programming inputs -- should affect the market price of what they buy. (See Jaffe R.T. 34 n.14.) To the extent public broadcasting's sources of revenues have any relevance to the issue of determining music

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1. The Final Report indicates that R. Bruce Rich, counsel for the Public Broadcasters in this proceeding, contributed to the completion of the Final Report. (Public Broadcasters Exh. 12X at 3.)

licensing fees, BMI's methodology takes this into account. The fact that the Public Broadcasters have different sources of revenues than the commercial broadcasters might have an effect on the size of their respective revenues or on the extent to which such revenues can or cannot be allocated to programming expenditures. BMI takes these facts into account by adjusting the commercial fees to accommodate differences between public and commercial broadcasting in terms of both their revenues and programming expenditures.

11. It is worth noting in this regard that between 1992 and 1996, total programming expenditures as a percentage of total public broadcasting revenues for public broadcasting routinely fluctuated from year to year by one to two percent. (Tr. 2862-63 (Jaffe); BMI Exh. 5X.) The Public Broadcasters have acknowledged that the combined increase in license fees requested by both BMI and ASCAP in this proceeding would fall well within this one to two percent range. (Tr. 2863-64 (Jaffe).) Moreover, the Public Broadcasters have acknowledged that BMI's music licensing fees have been relatively "small change." (Tr. 2666 (Jameson).)

#### **D. Programming Fare**

12. The Public Broadcasters claim as another difference between public and commercial broadcasting that they have different programming fare. (Public Broadcasters Findings ¶¶ 174-76.) As a threshold matter, it is clear that, for the most part, the public broadcasters carry very similar types of programming to those of commercial broadcasters. Both carry children's programming, news, documentaries, dramas, comedies, and films. (BMI Findings ¶ 77.) The differences that exist are mostly differences of emphasis.

13. Indeed, the Public Broadcasters have acknowledged in this proceeding that music programming is an important component of PBS programming in general and that there is a

"strong commitment" to music as part of PBS programming. (Tr. 2267, 2270 (Downey).)

Moreover, the Public Broadcasters have conceded that more music appears on public television than on commercial television. (Tr. 2269 (Downey).) In fact, "[m]usic programming takes up little space on the commercial broadcast networks' shelf. But that's not the case at PBS. The noncommercial network provides a lineup heavy with music series and specials." (BMI Exh. 2X (*Music is in the Mix at PBS*, Broadcasting & Cable, Sept. 1, 1997, at 49).)

14. But again, to the extent that the differences in programming fare are relevant, BMI's methodology accounts and adjusts for them. The fact that public and commercial broadcasting might have different programming from each other results in two potential differences between the entities for the purposes of determining music licensing fees. First, differences in programming might manifest themselves as differences in audience size. Thus, to the extent that the public stations broadcast programming that appeals to particular narrow interests (e.g., certain educational programming), it will likely attract a smaller audience share than that of commercial stations showing programming with a broader-based appeal (e.g., certain sports programming). But BMI's methodology takes into account this difference in programming fare by adjusting the commercial fees to take into account audience size. Second, a general difference in programming fare might affect the amount of music which public and commercial broadcasters use in their programming. For example, commercial television shows more sports programming than public television, but sports programming uses less music than many other types of programming. To the extent that differences in programming fare manifest themselves in differences in music use BMI's methodology also takes this into account, by

adjusting commercial fees to take into account differences between commercial and public broadcasting in terms of their music use.

## II. THE PUBLIC BROADCASTERS FAIL IN THEIR ATTEMPTS TO EXPLAIN AWAY THE HUGE DISPARITY BETWEEN COMMERCIAL BROADCASTING'S MUSIC LICENSING FEES AND PUBLIC BROADCASTING'S MUSIC LICENSING FEES

15. As noted in BMI's Proposed Findings, there is a vast disparity between what public broadcasters pay for a blanket license to use BMI music and what commercial broadcasters pay -- a disparity of about 300 times. (BMI Findings ¶ 12.) This disparity is reflected in a large inequality in the royalty payments made to individual composers depending on whether their work is performed on public or commercial broadcasting. Thus, Michael Bacon received for performances of his theme music on 18 PBS television stations, which would have earned him had they been performed on 18 network-affiliated stations -- a disparity of about 60 times. (BMI Findings ¶ 89; BMI Exh. 65.)

16. The Public Broadcasters attempt to explain away these huge disparities by stating that "[t]he difference in rates is accounted for by the fact that commercial and non-commercial broadcasters operate in separate and distinct markets." (Public Broadcasters Findings ¶ 180.) However, they offered no evidence that commercial and non-commercial broadcasters do in fact purchase inputs for their programming in separate and distinct markets. Indeed, all the evidence adduced in this proceeding demonstrated that commercial and public broadcasting operate in the same market for the purposes of music use.

17. It is undisputed that the same composers work on public broadcasting and commercial broadcasting, that the process of composing music is the same regardless of whether

that music is aired on commercial and public broadcasting, that the time commitment involved in composing music is the same regardless of whether that music is used on commercial and public broadcasting (and, if anything, is greater for public broadcasting), that composers receive the same amount in up-front fees regardless of whether their work is for public or commercial broadcasting, and that the same music is used by both public and commercial broadcasting.

18. Similarly public broadcasters and commercial broadcasters are in the same market for pre-existing rather than specially-composed music. Both license the identical types of music from the same source and both use it in their television or radio programming, and there is no evidence in the record that there is any differential in the prices paid for that type of music as between commercial and public broadcasters.

20. Even if the Panel were to accept BMI's fee proposal in this case, this would not eliminate the disparity between public broadcasting and commercial broadcasting. Under BMI's proposal, the public broadcasters would pay BMI \$6.895 million per year, whereas commercial broadcasters would pay about \$1.2 million per year. Therefore, even under BMI's proposal, composers and publishers would continue to receive far less in actual royalties for music broadcast on public

stations as opposed to commercial stations. BMI's proposal would simply lessen the vast and unwarranted disparity that exists today.

21. Given the vast inequality that currently exists between the amount composers earn for the same work depending on whether it is performed on public broadcasting or commercial broadcasting, it is clear that copyright owners are not adequately compensated. The Public Broadcasters claim that the fact that some composers choose to work for public broadcasting at the prevailing rates rather than boycott it altogether is evidence that the royalties paid for work performed on public broadcasting are adequate. (Public Broadcasters Findings ¶ 182.) This claim is erroneous. As a matter of law, it is for this Panel to decide what constitutes reasonable, fair market value compensation for composers and publishers, not to assume that that compensation has been or will be adequate simply because some composers continue to compose music for public broadcasting despite the disparity in compensation they receive.

22. In any case, the Public Broadcasters' arguments do not apply to those composers and publishers of pre-existing music, which is available in a prerecorded format, and who have no choice as to whether their music is played on public television or radio, because they are subject to a compulsory license. It is the duty of this Panel to ensure that such composers and publishers receive fair market value royalties for the use of their work.

### **III. THE PUBLIC BROADCASTERS OFFER NO BASIS TO SUPPORT THEIR CLAIM THAT THE FEES SET FORTH IN THE PRIOR AGREEMENTS REFLECT FAIR MARKET VALUE**

23. Contrary to the Public Broadcasters' assertion, section 118 does not set forth a specific or preferred "guidepost" for the Panel to consider in setting a fee in this proceeding. (See Public Broadcasters Findings ¶ 20.) Section 118 does not prefer voluntary agreements over

other evidence of the subsidy-free fair market value of the prospective license. (See BMI Findings ¶ 212.)

24. The Panel is free to reject prior agreements as the appropriate benchmark to use in setting license fees in this proceeding where the evidence points to another benchmark as more appropriate. Contrary to the Public Broadcasters' assertion (Public Broadcasters Findings ¶ 79), BMI does not bear any burden under section 118 to prove fraud or misinformation in connection with the prior agreements to justify the Panel's use of some other benchmark to set the fees for the period 1998-2002.

25. There is also no merit to the Public Broadcasters' assertion that the Panel should consider trends in public broadcasting that commenced only since the consummation of the most recent prior agreement in 1992. (Public Broadcasters Findings ¶ 68.) This is the first time that a CARP (or CRT) has had the opportunity to consider trends in public broadcasting since 1978. It would be an abdication of its duty for this Panel simply to ignore these trends for the purposes of setting fees for the future. The Panel is mandated to consider all relevant evidence in determining fair market value rates -- including trends that have been taking place prior to the last negotiated agreement.

26. The Public Broadcasters offered no evidence to suggest that the fees set forth in the prior agreements reflect fair market value. Rather the Public Broadcasters rested solely on the fact that the prior agreements were "voluntarily entered into." (Public Broadcasters Findings ¶ 79.) But, as noted in BMI's Proposed Findings, the Public Broadcasters have conceded that the fact that an agreement is voluntarily entered into does not itself mean that the fee therein by definition reflects fair market value. (BMI Findings ¶ 198.)

27. In their Proposed Findings both BMI and ASCAP marshal ample evidence to explain why the prior agreements do not reflect fair market value now and going forward, and why they are unreliable benchmarks for determining fees for the period 1998-2002. (BMI Findings ¶¶ 175-94; ASCAP Findings ¶¶ 280-81, 289-97.) The Public Broadcasters are unable to rebut this evidence.

**A. BMI's Non-Disclosure Provision**

28. The Public Broadcasters acknowledge that the non-disclosure provisions in BMI's prior agreements are actually even stronger than ASCAP's no-precedent clauses. (Public Broadcasters Findings ¶ 185 (noting that unlike the ASCAP no-precedent provision, the BMI non-disclosure provision "expressly forbids use of the agreement in a proceeding such as this").) The Public Broadcasters argue, however, that the fact that the prior BMI agreements contained a non-disclosure provision is irrelevant because BMI waived that provision in these proceedings. (Public Broadcasters Findings ¶ 185.) The argument is flawed.

29. The reason that the Public Broadcasters seek to rely on the prior BMI agreements is based on their claim that the fees set forth therein were voluntarily and willingly entered into, thereby satisfying the "willing seller" branch of the test for fair market value. (Public Broadcasters Findings ¶¶ 16, 57-58.) The fact that BMI insisted on including a strict non-disclosure provision in the prior agreements is a salient piece of evidence, among others adduced in this proceeding, however, that BMI did *not* believe that its prior agreements reflected fair market value at the time it entered into them, and reflects BMI's dissatisfaction with those fees. (See BMI Findings ¶ 179.) Even though BMI has waived, for this proceeding, the strict non-disclosure provision that was present in its prior agreements, it is nonetheless indisputable that

BMI insisted on that provision at the time it entered into those agreements. Specifically, the fact that BMI insisted on a provision that expressly prohibited disclosure of the fee in a subsequent CRT proceeding is strong evidence that BMI did not believe that the prior fees reflected fair market value. Thus BMI's recent waiver (in order to be allowed to adduce evidence as to music usage) of the non-disclosure provision (see BMI Findings ¶ 179) does nothing to detract from the fact that BMI's insistence on including that provision at the time it entered into the prior agreements demonstrates its belief that the prior fees did not reflect fair market value.

30. ASCAP has also sought to play down the presence of BMI's non-disclosure provision by implying that a reason BMI insisted on this provision was not to jeopardize BMI's negotiations with other music users. (ASCAP Findings ¶ 298.) This argument is incorrect. In making this implication, ASCAP overlooks a central feature of the non-disclosure provision -- it only covered the licensing fees. It is important to note in this regard that the license fee was set forth in a document separate and distinct from that of the license agreement. Only this separate document was governed by the non-disclosure provision. Thus, the non-disclosure provision did not extend to other data, which if made public, might undermine BMI's negotiations with other music users -- such as BMI's music share on public television. If BMI's sole concern in insisting on a non-disclosure provision were to avoid jeopardizing other negotiations, it would not have limited the non-disclosure provision to the fee alone, but would have extended the provision to BMI's music share on public television. The fact that BMI was concerned in having only its fee subject to a non-disclosure provision, which applied to future CRT proceedings, is evidence that BMI specifically intended that the fee not be used as a benchmark in future proceedings.

31. In the Librarian's most recent compulsory license decision, the Librarian ruled that a party may not rely upon prior agreements -- selecting the parts of the agreements that are favorable to the party -- and then ignore the economic significance of the agreement's non-disclosure provision:

"Courts recognize that complex transactions encourage tradeoffs among the various provisions and lead to results that most likely differ from those that would result from a separately negotiated transaction [citing *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir. 1990) (Public Broadcasters Exh. 1-X)] . . . Accordingly, the Register concludes that it was arbitrary for the Panel to rely on a single provision extracted from a complex agreement where the evidence demonstrates that the provision would not exist but for the entire agreement."

*Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25,394, 25,402 (1998). The Librarian then concluded:

"Because the partnership agreement included language that undermined any precedential value of the digital performance license included therein, the Register finds that the Panel's reliance on the DCR license fee as precedent was an arbitrary action. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29 (1983) (agency action is arbitrary where the agency offers an explanation for its decision that runs counter to the record evidence.)"

*Id.* at 25,403.

32. Similarly in the ASCAP rate court proceedings, the court has disavowed reliance on prior agreements where they were not reliable benchmarks for setting fees for the future.

33. In his decision in *United States v. ASCAP (In the Matter of the Application of Capital Cities/ABC, Inc., CBS, Inc. and National Broadcasting Company, Inc.)*, Civil Action No. 13-95 (WCC) (S.D.N.Y. 1994) (the slip opinion of which is incorporated as Public Broadcasters Exh. 4X) as to certain local television stations owned and operated by Capital Cities/ABC, Inc.,

CBS Inc. and National Broadcasting Co., Inc., Judge Conner rendered an opinion concerning the approach taken by Magistrate Dolinger in the *Buffalo Broadcasting* rate proceeding with respect to the terms of the prior agreements between ASCAP and the local television stations (the "*Shenandoah* license") which were in existence for a 10-year period (and which had similar predecessor agreements covering a 20-year period dating back to 1949). Judge Conner observed that while Magistrate Dolinger had determined that prior agreements "are at least a starting point for assessing" fees, Magistrate Dolinger "emphasized...that the court *should not blindly apply* the terms to which these or similar parties agreed in the past; rather, the court must examine the degree of comparability of the parties, the rights at issue, and *the economic circumstances affecting the parties.*" *Id.* at 14 (emphasis added).

34. Magistrate Dolinger essentially rejected reliance on the *Shenandoah* license for a number of reasons. *Id.* at 48 (*Shenandoah* agreement rejected on the grounds, inter alia, that evidence showed negotiators did not believe they had realistic alternative to agreeing to rates offered by ASCAP). Judge Conner observed that "the fact that the stations' negotiators agreed to *Shenandoah* does not in itself indicate they believed the terms therein were reasonable. To the contrary, the negotiators' testimony indicated otherwise." *Id.* at 15. Similarly in this proceeding there is ample evidence to show that BMI determined to enter into the prior agreements with the Public Broadcasters, rather than initiate a CRT proceeding, even though it did not believe the prior agreements reflected fair market value. (See BMI Findings ¶¶ 183-97.)

35. Judge Conner also observed in his decision that,

"it would be improper simply to accept the terms of those earlier agreements; rather, we would (1) examine the distinctive factors impacting those agreements, (2) consider claims that the agreements resulted from an inequity in bargaining power, and

(3) account for changed circumstances by making adjustments for both changes in the economic circumstances of the industry in general and of the parties in particular and changes in the nature and value of the rights at issue."

*Id.* at 46. Similarly, in this proceeding there is ample record evidence that there were "distinctive factors" affecting the prior agreements and that there have been changes in public broadcasting indicating that the prior agreements do not constitute reliable benchmarks for setting fees for the future.

36. Judge Conner held that the mere fact that the rate court existed as an option for the local television stations does not demonstrate that their prior agreement with ASCAP was reasonable for future periods without undertaking a deeper inquiry into the facts and circumstances surrounding that prior agreement, and changes in those circumstances affecting future periods. *Id.* at 49. *See also id.* at 51 ("it was not legal error for the Magistrate to diminish the relevance of the *Shenandoah* agreement due to the stations' perceived lack of alternatives...."). Similarly in this case, the fact that, in the past theoretically BMI or ASCAP could have brought a CRT proceeding does not in itself indicate that the prior agreement reflects fair market value.

#### **B. The Negotiations Over The 1992 Agreement**

37. The Public Broadcasters claim that in the 1992 negotiations "BMI's opening offer was only some five percent above the final fee to which the parties ultimately agreed" and they argue that "[t]his fact itself provides strong evidence that the fee agreed upon reflected fair value to BMI." (Public Broadcasters Findings ¶ 215.) This argument is incorrect.

38. The Public Broadcasters rely on the fact that PBS minutes of a negotiating session between BMI and the Public Broadcasters of July 9, 1992 show that Marvin Berenson of BMI

said that BMI would not accept less than                      But the Public Broadcasters ignore the evidence which shows clearly that, in making this request, Mr. Berenson did not intend the proposal to be indicative of fair market value at all. First, as Mr. Berenson testified, after decades of contentious, expensive, and distracting litigation with broadcast and cable television broadcasters, BMI had put a moratorium on new significant litigation with its users in 1992. (Tr. 3395-96 (Berenson).) Therefore, BMI had already decided that it was not going to litigate the issue of public broadcasting licensing fees prior to the time that Mr. Berenson began negotiations with the Public Broadcasters. (BMI Findings ¶ 186.) This is confirmed by the fact that the very first words uttered in that negotiating session, according to those same PBS minutes of July 9, 1992, were by Mr. Berenson who said: "I would like to begin by stating BMI's desire to resolve this issue without litigation before the Copyright Royalty Tribunal (CRT)." (Public Broadcasters Exh. 30X at 1; BMI Findings ¶ 186.)

39.        Second, during the very negotiating session in which Mr. Berenson made the proposal of                      he made it clear that he was giving the public broadcasters a discount relative to commercial broadcasters:

"I also have to tell you that, sitting on this side of the table, every group I deal with gives me the same story about how broadcasting isn't making any money; the commercial broadcasters say the same thing. But that it not a reason that we should therefore give you our product, or sell it for less than it's worth. *However, in these negotiations I do take into consideration the special nature of public broadcasting*".

(Public Broadcasters Exh. 30X at 5 (emphasis added).)

40.        Third, the minutes of the first negotiating session also show how Mr. Berenson arrived at the figure of                      per year. Mr. Berenson stated at that session that the proposal

of            was simply "based on the CPI, a cost of living adjustment" over the last agreement, but that "[BMI was] not overjoyed with [the] last agreement." (Public Broadcasters Exh. 30X at 8 and 1.) Therefore, Mr. Berenson was simply seeking a cost of living adjustment over a prior deal about which he had expressed dissatisfaction.

41.     In this context, the apparent            proposal should be seen for what it was -- a desire to reach a negotiated agreement in a context where BMI acknowledged that it was dissatisfied with that agreement, had already decided that it was not going to litigate, and was explicitly giving the Public Broadcasters a discount. It is clear, therefore, that the prior agreement in 1992 does not reflect fair market value.

**C.     The Uncertainty Of The Commercial Fees**

42.     BMI has asserted that one reason that it agreed to the prior agreements with the Public Broadcasters rather than commence a CRT proceeding was that in the past the commercial broadcasters' music license fees were uncertain and subject to radical change. In responding to this argument, the Public Broadcasters mischaracterize BMI's point in focusing on this uncertainty. The point is not that BMI did not know the value of its own music (Public Broadcasters Findings ¶¶ 221-22) -- although the fact that commercial fees were subject to variation by up to 75 percent at the time of the 1992 negotiations did contribute to some uncertainty about this. The point was that, as a matter of litigation strategy, BMI did not believe it could commence a CRT proceeding in a context where the commercial fees were uncertain because the Public Broadcasters would simply argue that any comparison to commercial fees could not be used as a basis to set public broadcasting fees in the light of this uncertainty. In the

1978 proceeding involving ASCAP, the Public Broadcasters took precisely this position. (See Berenson R.T. 9; BMI Findings ¶ 189.)

#### IV. THE PANEL'S TASK IS TO SET FAIR MARKET VALUE

43. It is settled under section 118 that compulsory license rates for public broadcasting must reflect "reasonable market value" of the copyrighted works and that Congress intended that there be no subsidy of public broadcasting by the owners of copyrighted materials. (Baumgarten D.T. 19-20; *1982 Adjustment of Royalty Schedule for Use of Certain Copyrighted Works in Connection with Non-commercial Broadcasting; Terms and Rates of Royalty Payments*, 47 Fed. Reg. 57,923 (1982) (ASCAP Exh. 17).) The CRT stated:

"The Tribunal has consistently held that the Copyright Act does not contemplate the Tribunal establishing rates below the *reasonable market value* of the copyrighted works subject to a compulsory license. As we discussed in our 1978 public broadcasting opinion, we have found the congressional committee reports to be particularly useful. The House Judiciary Committee report stated that Congress 'did not intend that owners of copyrighted material be required to subsidize public broadcasting.' The Senate Judiciary Committee report stated that section 118 'requires the payment of copyright royalties reflecting the fair value of the materials used.' "

(47 Fed. Reg. at 57,924-25 (emphasis added) (citations omitted).)

44. The Public Broadcasters' assertion that this Panel should use section 118 as a mechanism to implement policy considerations, which are not normally part of the calculation of a market place rate (Public Broadcasters Findings ¶ 17), is contradicted by the structure and legislative history of section 118 (see BMI Findings ¶¶ 59-71). Congress has already spoken on this issue in making it clear that copyright owners should not be required to subsidize public broadcasters. (BMI Findings ¶¶ 67-68.) It is not appropriate for the Panel to substitute its

judgment for that of Congress, and seek to balance the relative needs and merits of the Public Broadcasters with those of BMI composers and publishers. In any case, the Panel has not heard evidence which could enable it even to carry out such a balancing exercise.

45. Moreover, the authority cited by the Public Broadcasters does not support their assertion that the Panel should make its own public policy judgments in determining the value of the license. (See Public Broadcasters Findings ¶ 17, citing *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25,394, 25,409 (1998).) That case addressed section 114, not section 118. Section 114, which addresses the value of digital performances in sound recordings, contains certain built-in statutory criteria that the Panel is required to take into account. Section 118, by contrast, does not contain any such criteria. (BMI Findings ¶ 211; 17 U.S.C. § 801(b) (1) & (2).)

**V. BMI'S MUSIC USE ANALYSIS IS THE MOST RELIABLE IN THIS PROCEEDING**

**A. The Public Broadcasters' Music Use Analysis Underestimates The Amount of Music On Public Television**

46. Both the Public Broadcasters and BMI attempted to measure the quantity of music used by public broadcasters by duration, that is, by total number of minutes used and the average number of minutes used per showhour. (Jaffe D.T. 19-21; Willms D.T. 20-21.) The purpose of identifying music use was to determine if any adjustment should be made to the license fees according to each of the parties' respective fee-setting methodologies.

47. BMI's music use data are more reliable on this point than the Public Broadcasters'.

Indeed, Dr. Jaffe testified that he was not even interested in an accurate measure of the overall level of music use when he did his study. (Tr. 2859 (Jaffe).) He was interested only in the trend. (Tr. 2859 (Jaffe).) In this regard, Dr. Jaffe testified that he had less confidence in the exact number of minutes of music per hour used on public television in his study than in the trend over time. (Tr. 2860 (Jaffe).) Dr. Jaffe testified, "I think if you ask me, you know, am I confident that with respect to the intensity level, you know, is for total minutes -- you know, is 19 and a half minutes per hour in 1996 really the right number or is it 23 or 18 -- I would have less confidence in that than I do in the fact that I have a pretty accurate estimate of the trend from '92 to '96." (Tr. 2860 (Jaffe).)

As set forth below, the Public Broadcasters' study was under-inclusive in the scope of programming which it analyzed for music performances, and, thus, the Public Broadcasters' analysis underestimated the total amount of music used on public television.

48. Programming on public television is composed of local programming, syndicated programming and programming from the PBS national feed, distributed to local stations across the country via satellite. (See Downey D.T. 9-10.) The Public Broadcasters conceded that their music use study relied only on data from one of the three sources of public television programming -- the PBS national feed. The Public Broadcasters' study did not include *any* data for local and syndicated programming, which constitutes approximately one-third of public

television broadcast hours. (Jaffe D.T. 19; Tr. 2856 (Jaffe).) As such, the Public Broadcasters' conclusions as to total music use rest on the assumption that the one-third of the broadcast day which was not surveyed contained the same amount of music as that surveyed in the PBS national feed.<sup>2</sup> In addition, the Public Broadcasters' study counted each program that was put into the PBS national feed as airing only once and did not account for repeats of programs, when, in fact, there are many instances of programs being repeated on public television. (Tr. 2857-58 (Jaffe).) Moreover, the record evidence suggests music-intensive children's shows, such as *Shining Time Station*, are among the most heavily repeated shows. (See Tr. 3506 (Willms); Smith D.T. 8-11.) Consequently, by not accounting for the additional musical performances as a result of multiple broadcasts of programs on the PBS national feed, the Public Broadcasters' music study likely underestimated the total amount of music on public television.

49. The Public Broadcasters' study also was based on a limited coverage of cue sheets for the PBS national feed. On average for all years from 1992 to 1996, the percentage of broadcast minutes in the Public Broadcasters' study with episode-specific cue sheets was 49.6

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2. In addition, the Public Broadcasters' focus only on the music used on the PBS national feed as a proxy for public television as a whole likely caused the Public Broadcasters to underestimate BMI's share of music on public television overall.

percent. (Jaffe R.T. (Table A1).) Thus for an average of 50.4 percent of broadcast minutes for the five years, the study did not rely on episode-specific cue sheet information. For those episodes, the Public Broadcasters merely assumed, without conducting any investigation, that the music usage in the missing episodes was the same as the average usage for the episodes for which cue sheets were provided. (Jaffe D.T. 17.) On average for all years from 1992 to 1996, the percentage of broadcast minutes in the Public Broadcasters' study with series-specific cue sheets was 81.8 percent. (Jaffe R.T. (Table A1).) Thus for an average of 18.2 percent of broadcast minutes for the five years, the study did not include any cue sheet information. For those episodes, the Public Broadcasters merely assumed, again without conducting any investigation, that music use was equal to the average of all broadcasts with the same program "type." (Jaffe D.T. 18.) By analyzing cue sheets which accounted for only a portion of the PBS national feed, the Public Broadcasters' study was likely less accurate than the BMI music use study which was based on a more extensive cue sheet population. (See *infra* at ¶¶ 52-53.).

50. The Public Broadcasters' alternative reliance on its study of average music cues, or the average number of times per showhour music was used in a particular program, does not cure the gaps in their durational music use study. (Tr. 2847-48 (Jaffe).) Dr. Jaffe admitted that "it would be inappropriate to rely exclusively on cues." (Tr. 2853 (Jaffe).) In fact, as Dr. Jaffe admitted, a count of cues does not indicate anything about the actual amount of music used, as each cue is valued the same amount regardless of the length of the cue. (Tr. 2849 (Jaffe).) This is dramatically illustrated by a mistaken cue entry that was discovered in the Public Broadcasters' music use study during the course of this proceeding. There was an entry indicating a cue for the show *Sesame Street* that was for fifteen *hours* when in fact it should have been for fifteen

*seconds*. While, as Dr. Jaffe acknowledged, this mistaken cue entry necessarily affected the part of the Public Broadcasters' study based on duration, it did not at all affect the part of their study based on cues. (Tr. 2851 (Jaffe).)

51. The ASCAP rate court has criticized the use of cues in looking at music usage because each cue is valued the same regardless of the length of the cue. In *United States v. ASCAP (In the Matter of the Application of Buffalo Broadcasting Co., et al.)*, 1993-1 Trade Cas. (CCH) 69,643 (S.D.N.Y. 1993), both ASCAP and the local stations relied on music use studies in which they measured the music by counting "needledrops," or music cues. *Id.* at 69,672. The district court criticized this type of measurement as inappropriate, stating that:

"the stations' exclusive reliance on needledrops would appear to be inappropriate. As the stations themselves have emphasized, there are many different types of music usage in television programming, ranging from the fleeting and insignificant to the substantial and highly significant. The counting of needledrops necessarily ignores these distinctions since every needledrop is given the same weight, whether it represents only a few bars of an opening or closing program theme, or of a commercial or a public service announcement, or involves an extended musical performance that is the centerpiece of the programming. . . ."

*Id.* at 69,671-72.

**B. BMI's Analysis of the Public Broadcasters' Use of Music Is More Reliable Than Those Of The Public Broadcasters Or ASCAP**

52. BMI's music usage study was fully explained, subject to cross-examination, and was based on extensive underlying documentation that was produced well in advance of the hearing. Unlike the Public Broadcasters, BMI's music use study was based upon a far more comprehensive set of data.

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By contrast, the Public Broadcasters' data did not exceed 113,000 minutes of music per year for any of the years, 1992-96, that were studied. (Owen R.T. 2.)

54. BMI concluded that there had been a growth in overall music in contrast to the Public Broadcaster's finding of a 7.6 percent increase (Jaffe R.T. 26).

There is no evidence that two short music cues are more valuable than one long cue or that two short cues required more work or effort on behalf of a composer. The number of cues is simply a decision to stop and start music after it has played for a particular length of time. Accordingly, this criticism can be ignored.

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3. BMI presented rebuttal music data regarding changes in feature, theme and background music on public television to refute Dr. Jaffe's direct testimony which claimed the increase in overall music use from                      average music minutes per hour on public television between 1992 and 1996 should be ignored because he claimed that there was a decrease in feature music. (See Jaffe D.T. 20-21; (Data Underlying Figures 5 and 6 (Corrected))).)

56. Finally, the Public Broadcasters also criticized BMI for not having any specific data with respect to the use of music on public radio. (Public Broadcasters Findings ¶ 139.) This criticism is unwarranted since both the Public Broadcasters and BMI relied on the same public radio programming format data to determine radio music usage. (See Public Broadcasters Findings ¶¶ 122-29.)

**C. ASCAP's Credit-Based Analysis Is Totally Subjective**

57. The only evidence offered by ASCAP with respect to music use was a study based on the ASCAP credit system, not duration. (Boyle D.T. (Appendix B at 3-12).) The ASCAP credit system is based on the application of its own peculiar subjective judgments as to the value of certain types of music, which judgments have regularly changed over time. (*Id.*) Music use data based on duration is more reliable for the purposes of this proceeding as it presents a readily comparable objective measure of actual music use. (Tr. 1426-27 (Willms).)

**VI. THE TASK OF THE PANEL IS TO DETERMINE THE RATE FOR A BLANKET LICENSE**

58. The Public Broadcasters devote a portion of their Proposed Findings to a critique of the concept of a blanket license and to accusing BMI and ASCAP of wielding "market power" over the Public Broadcasters. (Public Broadcasters Findings ¶¶ 54-56, 58-62.) These claims are completely without basis.

59. While the Public Broadcasters criticize the blanket license, they have made clear that in this proceeding they seek a blanket license and, of course, Congress has mandated that they have such a license. (Tr. 262-63 (Statement of Public Broadcasters' counsel).) The United States Supreme Court expressly recognized that "Congress itself, in the new [1976] Copyright Act, has chosen to employ the blanket license." *Broadcast Music, Inc. v. Columbia*

*Broadcasting System, Inc.*, 441 U.S. 1, 15 (1979). The Supreme Court noted that section 118 expressly provides that a blanket license is the appropriate license for public broadcasters and reflects the view that the blanket license is economically beneficial within the context of that section. 441 U.S. at 15-16, quoting 17 U.S.C. §118(b) ("Moreover, in requiring noncommercial broadcasters to pay for their use of copyrighted music, Congress again provided that '[n]otwithstanding any provision of the antitrust laws' copyright owners " *'may designate common agents to negotiate, agree to, pay, or receive payments.'* §118(b). Though these provisions are not directly controlling [in the *CBS* antitrust case], they do reflect an opinion that the blanket license, and ASCAP, are economically beneficial in at least some circumstances.") (emphasis added).

60. The Public Broadcasters' claim that ASCAP and BMI wield market power is completely unsupported by any evidence. The only record evidence as to the bargaining power of BMI vis-à-vis the commercial broadcasting and public broadcasting industries is that BMI enjoys roughly the equivalent amount of bargaining power in negotiating with them through the all-industry committees. (See Owen D.T. 3.) With respect to the commercial broadcasting industry, BMI deals at arm's length with the all-industry committees and networks, and has a long history of negotiation. (See Owen D.T. 3; BMI Findings ¶¶ 109-12.) With respect to the public broadcasting industry, the undisputed evidence is that public broadcasting is a \$2 billion dollar industry and that since the section 118 license is compulsory, BMI and ASCAP must give a license to the Public Broadcasters. Moreover, under section 118, BMI's and ASCAP's only alternative to negotiating with PBS and NPR is to bring a CARP proceeding -- something which BMI has never done and something ASCAP has not done for twenty years. (See BMI Findings

¶ 16.) Indeed, the fact that in the 1992 negotiations, BMI sought -- and did not even receive -- cost of living adjustments to prior agreements hardly supports the image of an entity wielding great market power. (See Tr. 3413 (Berenson).) Moreover, Paula Jameson testified she was satisfied with the outcome of negotiations with BMI. (Tr. 2648 (Jameson).)

61. In any event, whatever may be the case with respect to prior rate court decisions concerning ASCAP's alleged market power, there is no similar case law finding that BMI wields market power. In *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563 (2d Cir. 1990), the Court emphasized that it did not believe that BMI exerted market power in its negotiations with the cable television network, Showtime. The Second Circuit affirmed the lower court's ruling which stated: "Although BMI performs a role equivalent to that of ASCAP -- indeed, that it the basis for looking to its agreements as a guide for an ASCAP fee -- it is not at all clear that it has or chooses to exert the type of leverage that [Showtime] attributes to it." *Id.* at 595.

## **VII. THE PUBLIC BROADCASTERS MISAPPLY THEIR OWN METHODOLOGY**

62. The Public Broadcasters' methodology is to start with the fees set forth in the 1992 agreements between themselves and BMI and ASCAP and to adjust the fees for "changes in (i) economic circumstances and (ii) music use, since the prior agreements were entered into." (Public Broadcasters Findings ¶ 65.) The Public Broadcasters claim that no adjustment to the prior fees of \$18.875 million is required in this proceeding to take into account changes in music use. With respect to changes in economic circumstances, the Public Broadcasters offer ranges to adjust for such changes from a minimum of 7.2 percent based on changes in programming expenditures (Public Broadcasters Findings ¶ 5) to a maximum of 13.1 percent based on revenue

changes (Public Broadcasters Findings ¶ 105). The Public Broadcasters propose adjusting the prior fees only by the minimum amount in the range to take into account economic changes -- 7.2 percent. (Public Broadcasters Findings ¶ 147.)

63. The Public Broadcasters misapply their own methodology in concluding that no adjustment is required to take into account the growth in music use and in concluding that the adjustment for growth to take into account changes in economic circumstances should be limited to 7.2 percent.

64. First, the Public Broadcasters ignored current, available data with respect to the Public Broadcasters economic circumstances. (Tr. 2833-34 (Jaffe).) PBS has been quoted as acknowledging that in the last two years it has enjoyed an " 'extraordinary and unprecedented' period of growth and ratings success." (BMI Exh. 1X (David Hatch, *PBS Salary Issue Up in Air*, Electronic Media, Feb. 23, 1998, at 32).) The PBS Annual Report for 1997 declares the "expansion" of PBS "from a new position of financial strength." (ASCAP Hearing Exh. 14X at 4.) The same Annual Report states that at the end of the fiscal year 1997, PBS "revenues, before underwriting and including strategic partnerships, showed an increase of 23 percent, topping our \$224 million target by \$23 million." (*Id.*) Programming expenses, too, of PBS are projected to increase by 50 percent by 2000. (ASCAP Hearing Exh. 14X at 11.) The Public Broadcasters acknowledged that a fifty percent increase in new programming expenses by PBS was "significant" and would be taken into account by the parties in their negotiations over music licensing. (Tr. 2844-46 (Jaffe).) If such an increase would be taken into account by the parties when negotiating, it should be taken into account in this proceeding, which seeks to ascertain what an actual market negotiation would yield.

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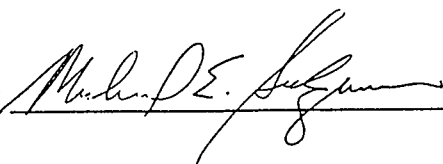
65. Second, with respect to music use, the Public Broadcasters claim that no adjustment should be made for changes in music use simply ignores BMI's data

## CONCLUSION

For the foregoing reasons, and the reasons set forth in the Proposed Findings of Fact and Conclusions of Law of Broadcast Music, Inc., BMI should be awarded its requested fees and terms from the PBS stations and the NPR stations.

Dated: June 8, 1998

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, David L. Sorgen, an attorney, hereby certify that I caused a copy of the foregoing Reply Proposed Findings of Fact and Conclusions of Law of Broadcast Music, Inc. in the Matter of Adjustment of Rates for Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6, before the Copyright Arbitration Royalty Panel, United States Copyright Office, Library of Congress, to be delivered by messenger on this 8th day of June on each of the parties listed on the attached service list.

Deponent is over the age of 18 and not a party to this proceeding.

I further certify under penalty of perjury that the foregoing is true and correct.

Executed on June 8, 1998.

  
\_\_\_\_\_  
David L. Sorgen

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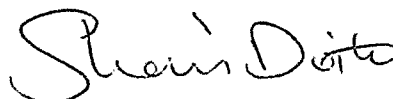
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Re: Noncommercial Educational Broadcasting  
Compulsory License (Docket No. 96-6  
CARP NCBRA)

Dear Ms. Giuffreda:

Pursuant to the Protective Order in this proceeding dated October 1, 1997, Broadcast Music, Inc. ("BMI") submits six copies of a redacted public version of the following document previously filed under seal: Petition of Broadcast Music, Inc. to Set Aside or, in the Alternative, Modify the Panel Report Dated July 22, 1998, dated August 5, 1998.

Respectfully submitted,



Sherri N. Duitz

Enclosure

cc: Counsel of Record (without enclosures)

W6-NY982250.042